

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**MEADE COUNTY,
Petitioner,**

HF No. 4 E, 2006/07

vs.

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 49,**

DECISION

and

**THERESA JENSEN, KRISTI
WARDELL, LINDA KESZLER, SUSAN
FORD, AND MARY FLESNER,
Respondents.**

This matter comes before the Department by way of a petition for unit determination pursuant to SDCL 3-18-4. Petitioner asserted that the representation of five individuals, Theresa Jensen, Kristi Wardell, Linda Keszler, Susan Ford, and Mary Flesner (the Five), has come into question. Respondents are split on this issue, with the International Union of Operating Engineers Local 49 (Union) arguing that the Five should remain in the bargaining unit and the Five arguing that they are treated substantially differently than other members of the bargaining unit. No party seeks decertification of the Union.

Meade County Sheriff Ron Merwin, Joell Beck, Human Resource Director for Meade County, Mary Flesner, designated spokesperson for the Five, and Kristi Wardell, one of the Five, were each duly sworn and testified in this matter. Mary Flesner, Ken Chleborad, Chief Deputy States Attorney for Meade County, and Terry Hutchison, Union representative, were each given opportunity to state the respective recommendations of the parties.

The Department received the following Exhibits:

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|-------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| Union Exhibit 1: | December 13, 2006, letter from Ken Chleborad. |
| Union Exhibit 2: | Page 3 of 34 of the Agreement [by and Between Operating Engineers Local 49 and Sheriff's Office, Meade County, South Dakota. |
| Petitioner's Exhibit 1: | A table detailing the wages of the Five |
| Petitioner's Exhibit 2: | A complete copy of the Agreement [by and Between Operating Engineers Local 49 and Sheriff's Office, Meade County, South Dakota. |

The Agreement by and between Operating Engineers, Local 49 and Sheriff's Office, Meade County, South Dakota, effective January 1, 2006 through December 31, 2007, (the Agreement) provides the following description of the employees in bargaining unit:

This 2006/2007 agreement made and entered into as of the first day of January, 2006 and terminating of December 31st 2007, between the Operating Engineers Union Local 49, hereinafter referred to as the "Union" and the Meade County Sheriff's Office a political subdivision of the State of South Dakota, hereinafter referred to as "County".

ARTICLE I (Recognition)

The County agrees to recognize and does hereby recognize the Union, its agents, representatives or successors as the exclusive bargaining agency for all of the employees of the County that are represented by the Union, in the following bargaining unit:

"All regular full-time and regular part-time employees of the Meade County Sheriff's Office, including but not limited to- Deputy Sheriffs, Correctional Officers, Correctional Support Staff, Dispatchers, Secretaries and excluding the Sheriff, Chief Deputy, Sergeants, and all other County employees."

The parties agree that there shall be further excluded from such unit all temporary replacement employees and part-time employees.

Under Article I, the Five are considered Secretaries. The Five receive less pay than other "secretaries" in the County for doing the same type of clerical work. Mary Flesner testified that she worked as a Deputy Auditor for six years before she began working for the Sheriff. She testified that the duties she performs for the Sheriff are basically the same as the duties she performed for the Auditor. The pay under the Agreement for the Five is governed by Article XIX:

Article XIX (Rates of Pay)

Section 1.

See Appendix "A" for rates.

Section 2.

An employee may be temporarily assigned to work in a lower or higher pay classification, with change in pay.

Section 3.

Pay rates under this contract are to be considered minimum.

Appendix "A" sets forth pay for secretaries as the same as "Court Officer Control Room Operators."

SDCL 3-18-4 provides:

When a governmental agency declines to grant formal recognition or when a question concerning the designation of a representation unit is raised by the governmental agency, labor or employee organization, or employees, the Department of Labor or any person designated by it shall, at the request of any of the parties, investigate such question and, after a hearing if requested by any party, rule on the definition of the appropriate representation unit. The Department shall certify to the parties in writing the proper definition of the unit. In defining the unit, the department shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency, the history and extent of organization, occupational classification, administrative and supervisory levels of authority, geographical location, and the recommendations of the parties.

The Department conducted a hearing via the Dakota Digital Network on April 3, 2007. Based upon that record, the Department makes the following analysis of the factors listed in SDCL 3-18-4.

The principles of efficient administration of government.

The Five do not engage in direct law enforcement activities. They do not carry firearms. Unlike Deputy Sheriffs, they do not confront citizens. They have little or no contact with the inmates of the Meade County Jail, save one of the Five who handles the administrative paperwork for the Jail Administrator. None of the Five is involved with arresting people or directly serving warrants. They do not perform corrections work. Sheriff Merwin explained that the Five's contact with the public is on a different level than the rest of the bargaining unit members. Sheriff Merwin explained that he feels that he must treat them differently than other members of the bargaining unit because of the nature of the information he must share with them. Sheriff Merwin also pointed out that four of the Five answer directly to him. The fifth member reports directly to the Jail Administrator, who reports directly to Sheriff Merwin.

Sheriff Merwin testified that he would like each of the Five to have the opportunity to advance to the Deputy II level of pay offered under County policies, but only if her duties and performance warranted it under those County policies. Beck testified that based upon their duties, the Five have the same occupational classification as other deputy administrators for the County. No party or witness provided evidence that would justify the inefficient policy of treating the Sheriff's administrative staff differently than all other elected officials' administrative staffs. The Sheriff's paperwork is assumed to be as important as the paperwork of other elected officials. Although each of the Five has been with him for five or more years, the Sheriff should have the same opportunity to retain qualified employees as other elected County officials.

The principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency.

Beck testified that each of the Five performs the same type of work, classified as administrative work and paperwork, as other administrative positions within the County, such as deputy Treasurers, deputy Auditors, deputy Registrar of Deeds. The Five do not perform law enforcement duties. Beck testified that based upon their duties, the Five have the same occupational classification as the other deputy administrators for the County. If the Five were not in the bargaining unit, each would receive more pay because of the classification of their work. Furthermore, the Sheriff would have the option of promoting any or all of the Five to Deputy II status. Beck testified that under the Agreement, the Sheriff cannot promote any of the Five to Deputy II pay, unlike other elected County officials. The principles of uniform position classification and compensation plans would best be served by equalizing the pay of the Five with comparable positions in other offices in County administration.

The history and extent of organization, occupational classification, administrative and supervisory levels of authority.

The description of the bargaining unit can be summed up as all individuals working under the Meade County Sheriff, except those in supervisory positions. No argument was made that the Five should be excluded from the bargaining unit because of any alleged supervisory authority. The Five do not have supervisory authority. Their work is of a routine, clerical nature, more similar to other administrative assistants in the County than to other members of the bargaining unit.

The evidence at hearing demonstrated that the employment considerations of the Five are different from the rest of the bargaining unit members. The duties of the Five do not involve the physical demands as the other members of the bargaining unit. Unlike other members of the bargaining unit, the Five:

1. do not have to carry fire arms and therefore do not have to be trained for life-threatening situations;
2. do not have to be certified in law enforcement or correctional procedures;
3. are not required to attend ongoing training;
4. all but one of the Five answer directly to the Sheriff, with no chain of command concerns; and
5. do not receive reimbursement or an allowance for clothing or equipment, nor are they required to wear uniforms or provide equipment to perform their duties.

The Five, through Mary Flesner and Kristi Wardell, demonstrated the difficulties in negotiating for these employment considerations in conjunction with the other bargaining unit members.

Geographical location.

The Five work in close proximity to other bargaining unit members. Four work directly with Sheriff Merwin and one works in the jail with the Jail Administrator.

The recommendations of the parties.

The County made no recommendation to the Department of Labor, but expressed its desire to address the concerns of the Five. The Union recommended that the Five remain part of the bargaining unit because they fall under the bargaining unit defined and recognized by the current negotiated agreement. The Five, through Mary Flesner, recommended that they be removed from the bargaining unit because they felt that they are not well represented by the Union leadership because of the differences in their duties and responsibilities to the County.

The Union argued that there is no way out for the Five and that they must stay in the bargaining unit. The Department declines to accept this argument. The only other option would be for the Five to attempt to decertify the Union. No one presented any evidence that decertification of the Union was warranted. Simply put, the Five feel that their employment considerations are different from the other members of the bargaining unit and; therefore, the Five wish to be classified with the rest of the administrative assistants/secretaries employed in the County. Beck testified that each of the Five would be classified as either Deputy I or Deputy II.

Upon consideration of the factors provided by SDCL 3-18-4, the Department finds that the administrative assistants/secretaries should be excluded from the bargaining unit. The bargaining unit should be defined as:

“All regular full-time and regular part-time employees of the Meade County Sheriff’s Office, including but not limited to- Deputy Sheriffs, Correctional Officers, Correctional Support Staff, Dispatchers and excluding the Sheriff, Chief Deputy, Sergeants, secretaries and all other County employees.”

Pursuant to SDCL 3-18-5, the Department shall conduct a secret ballot election among the Five to ascertain the representative for the purposes of formal recognition.

Petitioner shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Respondents shall have ten (10) days from the date of receipt of Petitioner’s proposed Findings and Conclusions to submit objections thereto or to submit its own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Petitioner shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 10th of May, 2007, in Pierre, South Dakota.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge