

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION)	
LABOR RELATIONS BUREAU)	FINDINGS OF FACT,
)	CONCLUSION OF LAW
Petitioner,)	AND
)	RECOMMENDED ORDER
vs.)	
)	
MONTANA PUBLIC EMPLOYEES)	
ASSOCIATION, INC.,)	
)	
Respondent)	

* * * * *

INTRODUCTION

The state filed a unit clarification petition under ARM 24.25.534 on August 18, 1980 and alleged that certain classes of positions, which are in the non-maintenance bargaining unit within the Department of Highways and which are represented by the Montana Public Employees Association, are supervisory and should, therefore, be excluded from the unit. On January 19 and 20, 1981 a hearing was held under authority of 39-31-207 MCA in accordance with ARM 24.26.630(5). Petitioner was represented by Jean Moffatt, Respondent by Dave Stiteler.

ISSUE

The issue raised is whether the incumbents of the below-listed classes of positions are supervisory employees as defined in 39-31-103(3) MCA:

- Programmer Analyst II
- Assistant Supervisor, Core Drill Section
- Engineering Officer I
- Materials Supervisor
- GVW Enforcement Officer II

FINDINGS OF FACT

Based on the evidence on the record, including the sworn testimony of witnesses, I find as follows:



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1. There are three Programmer Analyst II positions in the Systems and Programming Section of the Data Processing Bureau, Centralized Services Division, Department of Highways. They are classified at grade 14. Below them on the organization chart are a Programmer Analyst I at grade 13 and four Computer Programmer I's at grade 11. Immediately above them on the chart are the Supervisor of Systems and Programming and the Bureau Chief.

2. The Programmer Analyst II's perform duties involving the analysis, design, programming and maintenance of various computerized systems. They are assigned work and, in turn, assign work to the Programmer Analyst I's and Computer Programmer I's. If the work is done incorrectly they have them do it over again. The Analyst II's write up programs on how and what they want done and give it to the lower level employees.

3. They do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust grievances.

4. If one of the subordinate employees was to be suspended for a flagrant rule violation, the Analyst II would have to go to his superior and make a recommendation. The recommendation would be accepted if the superior believed he had sufficient grounds for the proposal. Recommendations on other personnel actions would be treated in like fashion.

5. A 1978 class specification for Programmer Analyst II shows, under the heading "Summary of Work," that incumbents "... may exercise supervision over personnel on a project or team leader basis on projects of limited magnitude and complexity. The 1978 Position Information Questionnaire of Timothy Cail, who was reclassified to Programmer Analyst

1 11 IN OCTOBER, 1978, SHOWS THAT ONE PERCENT OF HIS TIME WAS
2 spent assigning work to other programmers and supervising
3 them. At that time he had two Programmer Analyst I's under
4 him.

5 ASSISTANT SUPERVISOR, CORE DRILL SECTION

6 6. The Assistant Supervisor of the Core Drill Section
7 is in the Geology Section of the Materials Bureau of the
8 Engineering Division, Department of Highways. The position
9 is classified at grade 14 and is currently occupied by
10 Leonard Mahlum. Mr. Mahlum is supervised by the Supervisor
11 of the Core Drill Section who is responsible to the Supervisor
12 of the Geology Section. The head geologist reports to the
13 Materials Bureau Chief.

14 7. There are ten employees under Mr. Mahlum and with
15 whom he works. They are Drill Operators I, II and III's at
16 grade 9, 10 and 13 respectively.

17 8. He does not have the authority to hire, transfer,
18 suspend, lay off, recall, promote, discharge, reward, discipline
19 or adjust grievances. He does evaluate, assign and direct
20 others in their work. He does not become involved in interview-
21 ing employees. His general duty is to assist in the supervision
22 of the drilling section operations.

23 10. Mr. Mahlum can make recommendations on some personnel
24 actions to his superior, Mr. Keiley, who could change them
25 if he thought it necessary.

26 ENGINEERING OFFICER I

27 11. Engineering Officer I's at grade 14 are located in
28 the eleven division offices of the Department of Highways.
29 They report to the Division Construction Supervisor and
30 assist him in administering the construction activities in
31 progress in the division. Such assistance consists of
32 compiling reports, handling correspondence and acting as a

1 coordinator between the Construction Supervisor, the Project
2 Managers and the general public. The Construction Supervisor
3 reports to the Construction Bureau Chief who is responsible
4 to Administrator of the Engineering Division of the Department
5 of Highways.

6 12. The Engineering Officer I in the Missoula Division
7 is responsible for furnishing the field people with 30-35
8 temporary survey aides each year. To accomplish that task
9 he makes the necessary contacts from a list furnished by the
10 personnel office, interviews those who show up and sends
11 them to the field where they are supervised by field personnel.
12 He has no authority over them once he places them on the
13 payroll. His supervisor, Mr. Miller, could overrule any
14 selection he made. His function regarding the placement of
15 temporary survey aides is akin to that of a personnel officer.

16 13. One person, an Engineering Technician III at grade
17 13, is directly under the Engineering Officer I.

18 14. Engineering Officer I's do not have the authority
19 to transfer, suspend, lay off, recall, promote, discharge
20 reward, discipline or adjust grievances. They do assign and
21 direct the activity of one person and they place temporary
22 help on the payroll. They make recommendations regarding
23 some personnel actions to their supervisor, the Division
24 Construction Supervisor, who may or may not endorse them.

25 MATERIALS SUPERVISOR

26 15. Materials Supervisors are also located in the Highway
27 division offices. They are directly responsible to either
28 the Assistant Division Construction Supervisor or the Division
29 Construction Supervisor. They have five permanent employees
30 below them and at times have a couple of temporary people.

31 16. The incumbents of the Materials Supervisor positions
32 are responsible for inspecting, sampling and testing materials

1 used in highway construction. They are also responsible for
2 gravel prospecting and the administration of gravel crushing
3 contracts.

4 17. Materials Supervisors do not have the authority to
5 hire, transfer, suspend, lay off, recall, promote, discharge,
6 reward, discipline or adjust grievances. They assign work
7 and direct employees who are classified as Laboratory Supervisor
8 I at grade 12 and Laboratory Technicians at grades 9 and 11.
9 They can make recommendations to their immediate supervisor
10 on some personnel actions.

11 GVW ENFORCEMENT OFFICER II

12 18. There are eight GVW Enforcement Officer II's at
13 grade 12 assigned to various areas around the state. They
14 perform duties related to the enforcement of the laws, rules
15 and regulations governing the registration, size and weight,
16 safety and operating authority of commercial and farm vehicle
17 traffic. There are from five to seven GVW Enforcement
18 Officer I's at grade 11 assigned to each of the areas, they
19 work under the GVW Enforcement Officer II's.

20 19. The hierarchy within the Gross Vehicle Weight
21 Division of the Department of Highways begins with the
22 administrator at the top followed by the Assistant Admin-
23 istrator, the Chief of the Enforcement Bureau, the Assistant
24 Chief of the Enforcement Bureau, the GVW Enforcement Officer
25 II's and the GVW Enforcement Officer I's.

26 20. GVW Enforcement Officer II's do not have the
27 authority to hire, transfer, suspend, lay off, recall,
28 promote, discharge, reward, discipline or adjust grievances.
29 They assign personnel to work stations, direct them, evaluate
30 their work, train them on proper procedure and participate
31 in hiring and disciplining. They can make recommendations
32 on personnel actions to their immediate supervisor.

1 Assistant Chief of the Enforcement Bureau.

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3 DISCUSSION

4 This is the second of two unit clarifications filed by
5 the state on August 18, 1980 alleging that some of the
6 positions in two of the bargaining units represented by the
7 Montana Public Employees Association are supervisory and
8 should be excluded. The first, UC 6-80, involved positions
9 at the prison, this involves positions in the Highway's
10 non-maintenance unit. Both center around similar factual
11 situations and both require an application of the criteria
12 listed in 39-31-103(3) to those facts. For those reasons,
13 much of the discussion here will be repetitive of my discussion
14 in UC 6-80 issued earlier.

15 The term "supervisory employee" as defined in 39-31-103(3)
16 MCA is "...any individual having authority in the interest
17 of the employer to hire, transfer, suspend, lay off, recall,
18 promote, discharge, assign, reward, discipline other employees,
19 having responsibility to direct them, to adjust their grievances,
20 or effectively to recommend such action, if in connection
21 with the foregoing the exercise of such authority is not of
22 a merely routine or clerical nature but requires the use of
23 independent judgment." Such employees are not public employees
24 and are excluded from the Act.

25 The National Labor Relations Act, Section 2(11), contains
26 the same definition. In NLRB v. Metropolitan Life Insurance Co.,
27 405 F.2d 1169, 1173, 70 LRRM 2029 (1968), the NLRB was
28 upheld in ruling that possession of one of the listed powers
29 is sufficient to classify the individual as a supervisor.

30 In addition to the actual exercise of one or more of
31 the listed powers, one may be excluded as a supervisor if he
32 can effectively recommend a listed power. However, whether

1 in actual performance or in making a recommendation, to be
2 excluded as a supervisor, one must use independent judgment.
3 Unimedia Corps., 98 LRRM 1176 (1978); Poultry Enterprises, Inc.
4 v. NLRB, 216 F. 2d 798, 802, 35 LRRM 2151.

5 Contrary to the declarations made by some of the witnesses
6 at the hearing, there is not sufficient evidence on the
7 record to support a conclusion that any of the incumbents of
8 the five classes of positions have the authority to hire,
9 transfer, suspend, lay off, recall, promote, discharge,
10 reward, discipline, or adjust grievances using independent
11 judgment. In fact, the evidence supports the opposite
12 conclusion. The lack of any real authority in those areas
13 leaves the same remaining questions here as were discussed
14 in UC 6-80. Namely, can any of the incumbents make effective
15 recommendations in any of the areas listed in the statute
16 using independent judgment and does the assigning and directing
17 done by them require the use of independent judgment?

18 As in the first proceeding, UC 6-80, the employer
19 attempted to show changes in duties and responsibilities of
20 the position over a period of time and here they also stressed
21 the emphasis a former Highway Director placed on reorganization
22 and supervisory responsibilities. I made no findings related
23 to those propositions because the question is whether these
24 employees are supervisors under the Act's definition at the
25 time of the hearing.

26 In City of Davenport v. PERB, 264 N.W. 2d 307, 98 LRRM
27 2582 (1978), the Iowa Supreme Court upheld the Iowa Public
28 Employees Relations Board's determination that an effective
29 recommendation was one which, under normal policy and circum-
30 stances, is made at the chief executive level or below and
31 is adopted by higher authority without independent review or
32 de novo consideration as a matter of course.

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THE U.S. COURT OF APPEALS THIRD CIRCUIT IN NLRB v. Bequaere
Inc., 552 F.2d 519, 94 LRRM 2950 (1977), upheld an NLRB
ruling that assigning employees to work on a routine basis
is insufficient to create supervisory status because it does
not require the use of independent judgment within the
meaning of the statutory definition. See also Phalo Plastics
Corp., 127 NLRB No. 170, 46 LRRM 1221 (1960).

The employees occupying the positions involved in this
case do not make effective recommendations using independent
judgment on the personnel actions listed in the statute for
many of the same reasons discussed in UC 6-80. All are one
level removed from the workers whom they purportedly supervise.
None has subordinates who have authority over lower level
personnel. All are far removed from the upper levels of the
hierarchy where, one might reasonably infer, significant
decisions are made on all but the most routine personnel
actions shown under the act. All but the Assistant Core
Drill Section Supervisor have few employees under them. The
Assistant Core Drill Section Supervisor has 10 people,
however, he appears to serve as a conduit for relaying
orders and instructions from his superior. There are several
layers above all these positions. The NLRB considers whether
the determination that certain employees are supervisors
would create an unrealistic and excessively high ratio of
supervisors to employees. Central Buying Service, 223 NLRB
77, 92 LRRM 1145 (1976); Pinecrest Convalescent Home, Inc.,
222 NLRB 10 (1976), 91 LRRM 1082; Commerical Fleet Wash., 77
LRRM 1156 (1971).

The incumbents of the subject positions cannot be said
to use independent judgment in assigning and directing the
work of other employees. Their responsibility in those
areas appear to be of a routine nature. They perform the

1 same kind of work as their subordinates. See McQuaide and
2 City of Davenport, supra. They are lead workers. NLRB v.
3 Harmon Industries, Inc. 565 F. 2d 1047, 1051, 96 LRRM 3198
4 (1977).

5 Consideration of secondary indicia is not necessary
6 because the incumbents of these positions do not satisfy any
7 of the criteria shown in the act.

8 CONCLUSION OF LAW

9 The Programmer Analyst II's; Assistant Supervisor, Core
10 Drill Section; Engineering Officer I; Materials Supervisor;
11 and the G.V.W. Enforcement Officer II's are not supervisory
12 employees as that term is defined in 39-31-103(3) MCA.

13 RECOMMENDED ORDER

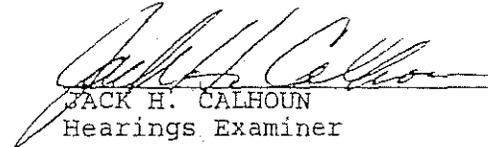
14 The state's petition to modify the non-maintenance
15 bargaining unit in the Department of Highways represented by
16 the Montana Public Employees Association is dismissed.

17 NOTICE

18 Exceptions to these findings of fact, conclusion of law
19 and recommended order may be filed within twenty days of
20 service. If no exceptions are filed, the recommended order
21 will become the order of the Board of Personnel Appeals.

22 Dated this 10th day of September 1981.

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26 BOARD OF PERSONNEL APPEALS

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30 JACK H. CALHOUN
31 Hearings Examiner
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The undersigned does certify that a true and correct
copy of this document was mailed to the following on the
10th day of September, 1981:

Montana Public Employees Association
1426 Cedar Street
Helena, Montana 59601

State Labor Relations Bureau
Room 130
Mitchell Building
Helena, Montana 59620

Ruby J. Foster

PAD2:I/10



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION,)
LABOR RELATIONS BUREAU,)
Petitioner,)
- vs -)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, INC.,)
Respondent.)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on September 10, 1981.

Exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order were filed by Jean Moffatt on behalf of the Petitioner, Labor Relations Bureau, Department of Administration, on September 30, 1981.

During oral argument before this Board on October 30, 1980, Jack Holstrom, attorney for the Department of Highways, modified the Petitioner's Exceptions to object only to the Recommended Order's conclusion that the following two positions were not supervisors: Materials Supervisor, GWV Enforcement Officer II. The Petitioners did not object or except to the Recommended Order's conclusion that the other three positions in the Order were not supervisory.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exception of Petitioner to the Findings of Fact, Conclusions of Law and Recommended Order's conclusion that Materials Supervisors are not supervisors is hereby denied.

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IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board, with the exception that this Board concludes that the GVW Enforcement Officer II's are supervisors. The reasons for that conclusion are that the Board is persuaded that the GVW Enforcement Officer II's possess the necessary independent judgment in making effective recommendations on assignment and direction of personnel to be supervisors.

DATED this 16th day of November, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 17 day of November, 1981:

Jean Moffatt, Labor Specialist
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Dave Stiteler
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Jennifer Jacobson

JAN 29 1982

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION,)
LABOR RELATIONS BUREAU,)
Petitioner,)
- vs -)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, INC.,)
Respondent.)

ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on September 10, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Jean Moffatt on behalf of the Petitioner, Labor Relations Bureau, Department of Administration, on September 30, 1981.

The Petitioner's exceptions were noticed for oral argument before the Board of Personnel Appeals at their October 30, 1981, meeting after which the Board issued its Final Order adopting the Findings of Fact, Conclusions of Law and Recommended Order of the hearing examiner with the exception that the GVV Enforcement Officer II's were excluded as supervisors. On November 19, 1981, the Respondent filed a Request for Rehearing alleging that new evidence was presented at the October 30, 1981, oral argument. The Request for Rehearing was opposed by the Petitioner.

After reviewing the record and considering the oral arguments, the Board of Personnel Appeals orders that the Request for Rehearing be denied for the reason that the Board's rules do not provide for a rehearing and the Board is therefore not

1 empowered to grant a rehearing. Bradco Supply Co. v. Larsen,
2 MT _____, 598 P.2d 596 (1979).

3 DATED this 25th day of January, 1982.

4 BOARD OF PERSONNEL APPEALS

5
6 By John Kelly Addy
7 John Kelly Addy
8 Chairman

8 * * * * *

9 CERTIFICATE OF MAILING

10 The undersigned does certify that a true and correct copy
11 of this document was mailed to the following on the 28 day
12 of January, 1982:

13 Jean Moffatt, Labor Specialist
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