

S T A T E R E P O R T E R

Box 749
Helena, Montana 59624

VOLUME 42

No. 84-406

IN THE MATTER OF THE UNIT CLARIFICATION
NO. 6-80, MONTANA PUBLIC EMPLOYEES
ASSOCIATION,

UC-6-1980

Petitioner and Appellant,

v.

Submitted: May 3, 1985
Decided: Aug. 5, 1985

DEPARTMENT OF ADMINISTRATION, LABOR
RELATIONS BUREAU; and THE BOARD OF
PERSONNEL APPEALS,

Respondents and Respondents.

UNIONS, Appeal from order excluding certain employees from a labor bargaining unit. The Supreme Court held that there was no error in affirming the agency decision that the grandfather clause does not apply when there has been election and certification of a new exclusive representative in a grandfathered agreement and bargaining unit.

Appeal from the First Judicial District Court, Lewis & Clark County, Hon. Henry Loble, Judge

For Appellant: Hjort, Lopach & Tippy; Barry L. Hjort, Helena

For Respondent: Jayne Mitchell, Dept. of Administration, Helena
James Gardner, Board of Personnel Appeals, Helena

Submitted on briefs.

Opinion by Justice Hunt; Chief Justice Turnage and Justices Morrison, Weber, Harrison, Sheehy and Gulbrandson concur.

Affirmed.

____ Mont. ____

____ P.2d ____

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APPEALS

No. 84-406

IN THE SUPREME COURT OF THE STATE OF MONTANA

1985

IN THE MATTER OF THE UNIT CLARIFICATION
NO. 6-80, MONTANA PUBLIC EMPLOYEES
ASSOCIATION,

Petitioner and Appellant,

-vs-

DEPARTMENT OF ADMINISTRATION, LABOR
RELATIONS BUREAU; and THE BOARD OF
PERSONNEL APPEALS,

Respondents and Respondents.

APPEAL FROM: District Court of the First Judicial District,
In and for the County of Lewis & Clark,
The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Hjort, Lopach & Tippy; Barry L. Hjort, Helena,
Montana

For Respondent:

Jayne Mitchell, Dept. of Administration, Helena,
Montana
James Gardner, Board of Personnel Appeals, Helena,
Montana

Submitted on Briefs: May 3, 1985

Decided: August 5, 1985

Filed: AUG 5 - 1985

Ethel M. Harrison

Clerk

Mr. Justice William E. Hunt, Sr., delivered the Opinion of the Court.

This is an appeal by the Montana Public Employees Association (MPEA), appellant, from an adverse decision by the Board of Personnel Appeals (BPA), respondent, and the decision of the District Court affirming the order of the BPA, that excluded certain employees from a labor bargaining unit.

We affirm.

Two issues are presented on appeal. They are: (1) Whether the District Court erred in affirming the agency decision that a change of exclusive representatives nullified the applicability of the grandfather clause provided for in § 39-31-109, MCA; and (2) Whether the District Court erred in denying the appellant's application to present additional evidence.

Prior to November 1979, the employees at Montana State Prison were represented in collective bargaining by the American Federation of State, County, and Municipal Employees, AFL-CIO. This representative was decertified and replaced by the MPEA in November 1979. After the representative of the employees changed, the Labor Relations Bureau of the Montana Department of Administration filed a petition for unit clarification of the labor bargaining unit before the BPA. The petition sought a determination that certain classes of employment positions at Montana State Prison were "supervisory employees" and therefore should be excluded from the labor bargaining unit.

A hearing examiner of the BPA determined that positions titled "correctional lieutenants" were "supervisory." The

appellant filed exceptions to this determination and the matter was then appealed to the BPA. The appellant argued before the board that a grandfather clause, § 39-31-109, MCA, contained in the Montana Public Employees Collective Bargaining Act, §§ 39-31-101 through 39-31-409, MCA, preserved the existing bargaining unit and precluded unit clarification. This argument was not made before the hearing examiner. After hearing and considering the matter the Board ruled that the change of representatives for the bargaining unit removed the existing unit from the application of the grandfather clause. The hearing examiner's proposed order was then adopted as the final order. The MPEA then petitioned for judicial review.

Before judicial review began, the agency order was stayed and the review was held in abeyance pending the outcome of *City of Billings v. Billings Firefighters Local No. 521* (Mont. 1982), 651 P.2d 627, 39 St.Rep. 1844. That case involved the grandfather clause as it pertained to bargaining units and bargaining agreements in existence in 1973, the effective date of the Act. After City of Billings was decided judicial review commenced. The appellant petitioned for leave to present additional evidence based on City of Billings. The District Court denied the request ruling that no good cause had been shown and affirmed the agency final order. It ruled that the Board's interpretation that a change of representative results in a loss of grandfather status was rational and not an abuse of discretion. This appeal followed.

Issue no. 1 concerns the propriety of the decision of the BPA that a change of representative nullifies application of the grandfather clause. In 1973, the Montana legislature

enacted a law governing collective bargaining for public employees. This law is contained in §§ 39-31-101 through 39-31-409, MCA, the Montana Public Employees Collective Bargaining Act. Several provisions of this Act are relevant here. First, the policy of the Act:

"39-31-101. Policy. In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the State of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees."

Next, pursuant to national labor policy, as set forth in the National Labor Relations Act, 29 U.S.C. § 151, et seq. (1976), the Montana Act specifically excludes supervisory and management employees from the definition of "public employee." Section 39-31-103(2)(b)(iii), MCA. Only public employees are allowed to bargain collectively. Section 39-31-201, MCA. Supervisory and management employees were effectively denied membership in collective bargaining units. See, *City of Billings v. Billings Firefighters Local No. 521* (Mont. 1982), 651 P.2d 627, 629, 39 St.Rep. 1844, 1845.

The last provision applicable here is the grandfather clause:

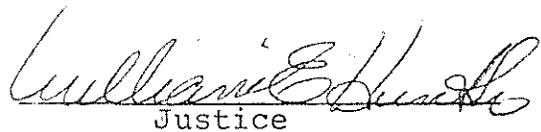
"39-31-109. Existing collective bargaining agreements not affected. Nothing in this chapter shall be construed to remove recognition of established collective bargaining agreements already recognized or in existence prior to July 1, 1973."

The Board of Personnel Appeals held that this statutory provision does not apply when there has been "such a change of exclusive representatives in a grandfathered agreement and bargaining unit." "Such a change" meaning election and certification of a new exclusive representative.

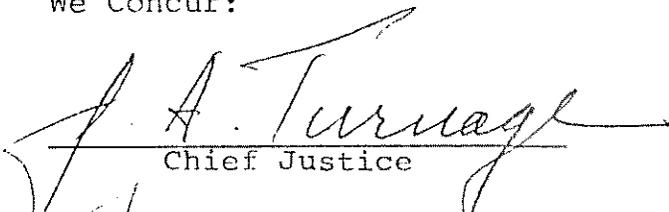
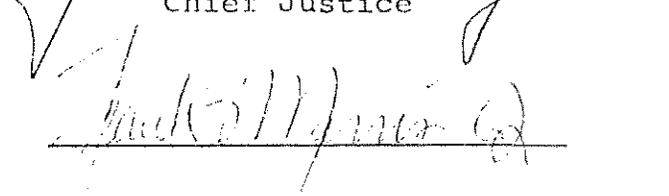
The Board of Personnel Appeals argues that a change of exclusive representation nullifies the applicability of the grandfather clause as to preserving the unit. The Board argues that the term "recognized," in its technical labor vernacular, applies only to representatives and it therefore follows that, because units are not "recognized," the legislature did not intend to preserve units by enacting the grandfather clause. This interpretation of the law is rational. The word "recognized" as used in § 39-31-109, MCA, is a term of art used in labor as referring to a representative. The BPA decision also is in line with relevant portions of the acts set forth above which, in effort to remove causes of strife and unrest, exclude supervisory employees from bargaining units. We hold that the District Court did not err in affirming the agency decision.

Issue no. 2 need not be considered or decided here because the resolution of issue no. 1 negates the need for additional evidence based on City of Billings to be received in this case.

The District Court is affirmed.


Justice

We Concur:


Chief Justice


[Handwritten Signature]

John Conway Harrison

[Handwritten Signature]

R. C. Dunbranson.
Justices

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BOARD OF PERSONNEL APPEALS

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * * * *

IN THE MATTER OF THE UNIT)	
CLARIFICATION NO. 6-80, MONTANA)	
PUBLIC EMPLOYEES ASSOCIATION)	NO. 47495
)	
PETITIONER)	
)	
vs.)	NOTICE OF ENTRY OF JUDGMENT
)	
DEPARTMENT OF ADMINISTRATION,)	
LABOR RELATIONS BUREAU; AND THE)	
BOARD OF PERSONNEL APPEALS)	
)	
RESPONDENTS)	

* * * * *

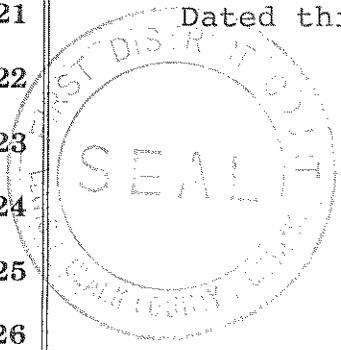
TO: MONTANA PUBLIC EMPLOYEES ASSOCIATION AND ITS ATTORNEY OF RECORD;
DEPARTMENT OF ADMINISTRATION, LABOR RELATIONS BUREAU AND ITS ATTORNEY OF RECORD; AND
BOARD OF PERSONNEL APPEALS AND ITS ATTORNEY OF RECORD.

Notice is hereby given that on the 16th day of July, 1984, this court entered judgment in favor of Department of Administration, Labor Relations Bureau, and Board of Personnel Appeals and against the Montana Public Employees Association, a true and correct copy of which is attached to this Notice and served upon you.

Dated this 16th day of July, 1984.

CLARA GILREATH, Clerk of Court

By: DARLENE K. GALLAGHER, Deputy



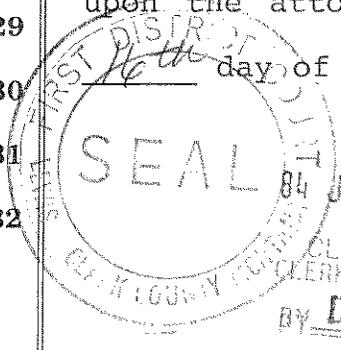
* * * * *

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon the attorneys of record at their address or addresses this 16th day of July, 1984.

CLARA GILREATH, Clerk of Court

By: DARLENE K. GALLAGHER, Deputy



CLARA GILREATH
CLERK OF DISTRICT COURT
BY: DARLENE K. GALLAGHER

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * * * *

IN THE MATTER OF THE UNIT)
CLARIFICATION NO. 6-80, MONTANA)
PUBLIC EMPLOYEES ASSOCIATION) NO. 47495
)
PETITIONER)
)
vs.) JUDGMENT
)
DEPARTMENT OF ADMINISTRATION,)
LABOR RELATIONS BUREAU: AND THE)
BOARD OF PERSONNEL APPEALS)
)
RESPONDENTS)

* * * * *

This cause came before the court for hearing on June 7, 1984, on a petition for judicial review. Barry L. Hjort of Helena, Montana represented petitioner Montana Public Employees Association. Jayne Mitchell of Helena, Montana represented respondent Department of Administration, Labor Relations Bureau; and James E. Gardner of Helena, Montana represented respondent Board of Personnel Appeals. The parties filed briefs and argued the issues on June 7, 1984, and the court, after oral argument and consideration of the briefs entered its order dated July 6, 1984 and hereby directs that judgment be entered in accordance therewith:

IT IS ORDERED, ADJUDGED, AND DECREED:

1. The final order of the Board of Personnel Appeals in the matter of unit clarification #6-80 entitled "Department of Administration, Labor Relations Bureau Petitioner v. Montana Public Employees Association, Respondent," and dated November 16, 1981, is affirmed and sustained.
2. Petitioner's application to present additional evidence filed herein on May 21, 1984, is denied.
3. The stay granted June 24, 1982, is vacated.

Dated this 16th day of July, 1984.

FILED
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CLARA G. BEATH
CLERK OF DISTRICT COURT
BY DARLENE K. GALLAGHER

HENRY LOBLE
District Judge

JUL - 9 1984

BOARD OF PERSONNEL APPEALS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA,

IN AND FOR THE COUNTY OF LEWIS AND CLARK.

IN THE MATTER OF UNIT CLARIFICATION NO. 6-80
MONTANA PUBLIC EMPLOYEES ASSOCIATION,

No. 47495

Petitioner,

vs.

ORDERDEPARTMENT OF ADMINISTRATION, LABOR RELATIONS
BUREAU; AND THE BOARD OF PERSONNEL APPEALS,Respondents.

This is a petition for judicial review (see Section 2-4-702, MCA, et seq.) by the petitioner, Montana Public Employees Association, MPEA, from an adverse decision it received from the Board of Personnel Appeals, BPA, on November 16, 1981.

The respondent, BPA, is a quasi-judicial board created by Section 2-15-1705, MCA. It is responsible for hearing and determining issues concerning the composition of appropriate collective bargaining units under the authority of the Montana Public Employees Collective Bargaining Act, Section 39-31-101, et seq., MCA.

The respondent, Labor Relations Bureau of the Department of Administration, filed a Unit Clarification Petition pursuant to ARM 24.26.534 on August 18, 1980, before the BPA alleging that certain classes of positions, including those positions classified as Correctional Lieutenants in the bargaining unit at Montana State Prison, MSP, were supervisory and should therefore be excluded from the appropriate bargaining unit, pursuant to 39-31-103(2) (b) (iii) and (3), MCA. The preliminary decision of the BPA hearing examiner dated September 1, 1981 was that the Correctional Lieutenants were supervisory employees under the Act and should be excluded from the MSP bargaining unit. The petitioner, MPEA, on September 22, 1981, filed an exception to this decision. The exception and only issue, as far as this Court is concerned, is the contention of MPEA that the Correctional Lieutenants were wrongfully excluded from the bargaining unit because they were not "grandfathered in," and that if they were grandfathered an improper test was applied to determine if the lieutenants were supervisory. On this point, the BPA held that the grandfather clause of the Public Employees Collective Bargaining

1 Act, 39-31-101, et seq., has no application whenever there is a change of
2 exclusive representatives in a grandfathered agreement and bargaining unit. In this
3 case, there had been such a change subsequent to 1973, the effective date of the
4 Act. The Board said: "The grandfather clause was and is used to protect contracts
5 and bargaining units in existence in 1973 (the date of the Act). This bargaining
6 unit was subsequently decertified in 1979 and a new exclusive representative
7 certified. This change in the contract and bargaining unit to a new exclusive
8 representative negates the applicability of the grandfather clause."

9 Inasmuch as the grandfather clause does not apply to respondent in this case,
10 the position of Correctional Lieutenant was found by the BPA to be excluded from the
11 bargaining unit pursuant to 39-31-103 (2) (b) (iii) which provides that "'Public
12 Employee' does not mean: . . . (iii) a supervisory employee as defined in subsection
13 (3) of this Section."

14 The grandfather clause is Section 39-31-109 MCA which reads as follows:

15 "Existing collective bargaining agreements not
16 affected. Nothing in this chapter shall be
17 construed to remove recognition of established
18 collective bargaining agreements already
19 recognized or in existence prior to July 1, 1973."

20 The recent case of City of Billings v. Billings Firefighters, 39 State
21 Reporter 1844, ___ Mont. ___, 651 P.2d 627,632, provides standards for this Court to
22 follow in making a determination as to whether the decision of the BPA relative
23 to the grandfather clause should be upheld.

24 In Firefighters, our Supreme Court said, among other things, as follows:

25 "Pursuant to that statute, (Sec. 2-4-704, MCA)
26 findings of fact by an agency have been subject to
27 a 'clearly erroneous' standard of review by the
28 courts. Wheatland County v. Bleeker (1978), 175
29 Mont. 478, 575 P.2d 48. Conclusions of law are
30 subject to an 'abuse of discretion' review. These
31 standards differ due to the agency's expertise re-
32 garding the facts involved and the court's
33 expertise in interpreting and applying the law. Davis' 4
34 Administrative Law Treatise, §29.01 (1958).

35 "Both statutory and case law have employed the
36 terms 'clearly erroneous,' 'abuse of discretion' and
37 'substantial credible evidence' in form not entirely
38 clear nor consistent. We view this as an appropriate
39 opportunity for clarification.

40 "Specifically, the factual findings of the BPA will
41 be upheld if supported by substantial evidence.

1 Section 39-31-409(4), MCA. MAPA allows factual
2 findings to be overturned when they are 'clearly
3 erroneous in view of the reliable, probative and
4 substantial evidence on the whole record.'
5 Section 2-4-704 (2)(e), MCA. We find these tests
6 can be harmonized. If there is substantial credible
7 evidence in the record, the findings are not
8 'clearly erroneous.' Under either statute the scope
9 of judicial review is the same. If the record
10 contains support for the factual determinations made
11 by the agency, the courts may not weigh the evidence.
12 They are bound by the findings of the agency.

13 "In reviewing legal questions, the scope of review
14 is broader. Where the intent of statutes is unclear,
15 deference will be given to the agency's interpretation.
16 Ford Motor Credit Co. v. Milhollin (1980), 444 U.S. 555,
17 100 S. Ct. 790, 63 L. Ed.2d 22; FCC v. WNCN Listeners
18 Guild, et al. (1981), 450 U.S. 582, 101 S. Ct. 1266, 67
19 L.Ed. 2d 521. Where it appears that the legislative
20 intent is clearly contrary to agency interpretation, the
21 courts will not hesitate to reverse on the basis of
22 'abuse of discretion.'

23 "The determination of a bargaining unit involves
24 mixed questions of law and fact as is hereafter discussed.
25 In reviewing the BPA's findings of fact and conclusions of
26 law, we will be bound by the foregoing scope of review.

27 "The BPA's interpretation of section 39-31-109, MCA,
28 the grandfather clause is primarily a question of law.
29 Therefore, the reviewing court should determine whether
30 that interpretation involves 'abuse of discretion.'"

31 Therefore, the standard to be applied by this Court is whether the BPA's
32 interpretation of the grandfather clause is rational, and does not involve an abuse
33 of discretion. This Court holds that the BPA's interpretation meets this standard
34 as above set forth by the Montana Supreme Court in Firefighters. BPA rationally
35 reasons that the word "recognition" as used in Section 39-31-109 MCA is a term of
36 art as used in labor parlance and can only refer to the exclusive representative of
37 the unit, MSP. Consequently a change in the representative such as occurred here
38 in 1979 results in a loss of grandfather status under the statute. This
39 interpretation is not "an abuse of discretion" by the BPA.

40 This Court specifically affirms and sustains the holding of the Board of
41 Personnel Appeals as to the "Findings of Fact; Conclusions of Law; and Recommended
42 Order," dated September 1, 1981 and the "Final Order" of BPA dated November 16, 1981,
43 which not only adopted the foregoing mentioned Findings of Fact; Conclusions of Law,
44 and Recommended Order but also denied the exception of petitioner as to its

1 contentions under the grandfather clause.

2 On May 21, 1984, petitioner filed an application to present additional
3 evidence. This is opposed by the respondents. This case was filed on December 16,
4 1981. A stay of the BPA decision excluding the Correctional Lieutenants was
5 obtained from the Court on June 24, 1982. By virtue of this stay, the Correctional
6 Lieutenants have remained unaffected by BPA's final Order ever since it was made on
7 November 16, 1981. Petitioner was well satisfied with this stayed condition of the
8 lawsuit and did nothing whatever to prosecute this case to a conclusion for almost
9 2 years. However, on March 6, 1984, this Court "rocked the boat" by issuing an
10 Order which advised the parties that the cause would be dismissed by the Court on
11 its own motion if further proceedings were not initiated prior to April 6, 1984.
12 This stirred petitioner into action. As is pointed out by respondents, if this
13 Court should send the matter back to BPA for presentation of additional evidence, a
14 further time delay would ensue, thus giving petitioner a further benefit under the
15 stay order. However, regardless of this, this Court does not feel that the return
16 of this matter to BPA for presentation of additional evidence would serve any useful
17 purpose under the facts existing here. There is no doubt that the bargaining
18 agent was changed subsequent to the year 1973, the effective date of the Act, and
19 that is the point relied upon by the BPA in its holding that the grandfather
20 clause has no application. Under the Board of Personnel Appeals' interpretation of
21 the grandfather clause the protection is lost when the "recognized" exclusive
22 representative is changed. Hence, evidence relating to whether the bargaining unit
23 was changed in other particulars is irrelevant. As the grandfather clause is
24 interpreted by the Board, the change in exclusive representatives voided the grand-
25 father status previously accorded to the bargaining unit. New evidence is not
26 necessary. Petitioner does not deny that the exclusive representative has been
27 changed.

28 The Court, furthermore, finds that petitioner has not shown that there were
29 good reasons for its failure to present this "additional evidence" in the proceed-
30 ings before the BPA.

31 The application to present additional evidence is DENIED.

32 Now, therefore, it is hereby ordered:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION #6-80:

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

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on September 1, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Dave Stiteler on behalf of the Respondent, Montana Public Employees Association, on September 22, 1981.

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

1. The current exclusive representative of the unit involved in this proceeding (Respondent Montana Public Employees Association) was certified by this Board subsequent to 1973, the effective date of the Public Employees Collective Bargaining Act, 39-31-101, et seq. The election for the current exclusive representative was conducted by this Board and the certification issued in 1979. This Board holds that the grandfather clause of the Act has no application whenever there is such a change of exclusive representatives in a grandfathered agreement and bargaining unit.

The grandfather clause was and is used to protect contracts and bargaining units in existence in 1973 (the date of the Act). This bargaining unit was subsequently decertified in 1979 and

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a new exclusive representative certified. This change in the contract and bargaining unit to a new exclusive representative negates the applicability of the grandfather clause.

2. IT IS ORDERED, that the Exceptions of Petitioner to Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

3. 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.

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:

Art McCurdy, Labor Specialist
Labor Relations Bureau
Department of Administration
Room 130 - Mitchell Building
Helena, MT 59620

Dave Stiteler
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59620

Jennifer Jacobson

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-80:

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

* * * * *

INTRODUCTION

The state filed a unit clarification petition under ARM 24.26.534 on August 18, 1980 and alleged that certain classes of positions, which are in the bargaining unit at Montana State Prison and which are represented by the Montana Public Employees Association, are supervisory and should, therefore, be excluded from the unit. On December 17, 1980 a hearing was held under authority of 39-31-207 MCA and in accordance with ARM 24.26.630(5). Petitioner was represented by Mr. Art McCurdy, Respondent by Mr. Dave Stiteler.

ISSUE

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

- Butcher Supervisor II
- Ranch Manager I
- Mail Clerk Supervisor II
- Warehouse Foreman II
- Correctional Sergeant
- Correctional Lieutenant

1 FINDINGS OF FACT

2 Based on the evidence on the record, including the sworn
3 testimony of witnesses, I find as follows:
4

5 BUTCHER SUPERVISOR II

6 1. The incumbent of the Butcher Supervisor II position, Mr.
7 Fasso, is responsible for the slaughtering of animals and the
8 processing of meat for the state institutions. There are five
9 civilian meat cutters, who work under him; inmates also assist in
10 the process. His immediate supervisor is the ranch manager, Don
11 Smith, who in turn is directly responsible to an associate warden
12 or to the warden.

13 2. Mr. Fasso instructs others and participates in the
14 slaughtering, cutting and processing of meat. He sits on a hiring
15 panel of three people which makes recommendations to higher levels
16 in the hierarchy on employee selection.

17 3. Mr. Smith reviews other personnel action decisions of
18 the panel on which Mr. Fasso sits, however, he does not make the
19 final decision, that is done by the Warden. All personnel matters
20 handled by the panel are treated in this fashion. The decision of
21 the panel is in most cases accepted; however, it is not accepted
22 in all cases.

23 4. Mr. Fasso makes recommendations to Mr. Smith relative to
24 any significant personnel action. Mr. Smith reviews them and
25 makes recommendations to his supervisor.
26

27 RANCH MANAGER I

28 5. The incumbent of the Ranch Manager I position, Mr.
29 Warren Weer, is responsible for the hay, grain, and dairy operation
30 at the prison ranch. His immediate supervisor is Don Smith, the
31 ranch manager. Mr. Weer has seven people who work under him;
32 inmates also assist.

1 6. Mr. Weer instructs others and participates in the ranch
2 work. He sits on a hiring panel which makes recommendations on
3 employee selection to higher levels within the organization.

4 7. Mr. Smith reviews other personnel action decisions made
5 by the panel. He does not make the final decision, however. That
6 is made by the Warden, as are all decisions made by the panel.
7 The decision of the panel is in most cases accepted, however, it
8 is not accepted in all cases.

9 8. Mr. Weer makes recommendations to Mr. Smith on significant
10 personnel actions. Mr. Smith reviews them and makes his recommenda-
11 tions to his supervisor.

12
13 MAIL CLERK SUPERVISOR II

14 9. June Hickman is the occupant of the Mail Clerk Supervisor
15 II position at the prison. She has three full-time people plus
16 two seasonal employees under her. Her immediate superior is the
17 Associate Warden for Security, Gary Weer. Her duties are to
18 instruct others, and to participate in the receiving, sorting and
19 routing of incoming mail and in the collection and preparation of
20 outgoing mail.

21 10. Ms. Hickman has the authority to sit on a hiring panel
22 which makes recommendations to higher levels on employee selection.

23 11. Significant personnel actions which would affect mailroom
24 employees subordinate to Ms. Hickman would be discussed with and
25 reviewed by Mr. Weer prior to being taken.

26
27 WAREHOUSE FOREMAN II

28 12. The incumbent of the Warehouse Foreman II position is
29 Ted Davis. He has seven people under him and is directly
30 responsible to the Associate Warden of Administration, Bill McCrea.
31 The duties of the position are, in general, to maintain a capitol
32 inventory and the prison warehouse. He instructs others and

1 participates in the tasks necessary to execute warehousing and
2 inventory responsibilities.

3 13. Mr. Davis sits on a hiring panel which makes recommenda-
4 tions on employee selection to higher levels within the organization.

5 14. Mr. McCrea reviews other personnel action decisions made
6 by the panel. He does not make the final decision, however, that
7 is made by the Warden. Recommendations made by the panel are not
8 necessarily accepted.

9 15. None of the four positions listed above has the authority
10 to hire, transfer, suspend, lay-off, recall, promote, discharge,
11 reward, discipline or adjust grievances. Within their respective
12 areas of responsibility they direct and assign employees to specific
13 tasks. Except for the scheduling and assigning of employees to
14 their routines, all acts require that the person receive approval
15 from a superior and in cases involving hiring, firing, suspension
16 and other discipline it entails an extensive panel review and
17 independent investigation. The panel itself then makes a recommen-
18 dation relative to the proper course of action.

19
20 CORRECTIONAL SERGEANTS AND LIEUTENANTS

21 16. The security function at the prison is organized under a
22 chain of command which runs from the Warden down through the Deputy
23 Warden, Associate Warden for Security, a Captain, six Lieutenants,
24 16 Sergeants, Correctional Officers II's and Correctional Office I's.
25 There are approximately 180 employees in the security function.

26 17. Lieutenants are in charge of a shift and when they serve
27 as duty officer they may be in charge of the entire prison. On a
28 shift they have approximately five Sergeants and from 25 to 30
29 Correctional Officers under them. They assign posts, call in
30 replacement help, suspend employees pending a hearing, grant
31 limited vacation and other leave, evaluate employees and spend
32 about half their time watching and directing inmates.

1 18. When a Lieutenant takes an adverse personnel action
2 (e.g., sending an employee home for drunkenness) a hearing is held
3 before a panel which reviews written reports, calls witnesses and
4 makes its own investigation. The panel makes a recommendation to
5 the Warden.

6 19. Lieutenants evaluate the performance of probationary
7 Correctional Officers. If their performance is not satisfactory,
8 the Lieutenant recommends they be dismissed. Employee evaluations
9 are reviewed by the associate Warden for Security.

10 20. Sergeants work under Lieutenants and are directly responsi-
11 ble to them. They have 5 or 6 Correctional Officers under them on
12 a shift and are generally responsible for the security and custody
13 functions of an individual housing unit. They do not evaluate
14 employees, but they provide progress reports to Lieutenants for
15 them to use in their evaluations.

16 21. Sergeants coordinate the activities of Correctional
17 Officers on their shift who are assigned to their individual
18 housing units. They mediate disputes between such officers and
19 inmates, monitor inmate behaviour, make inspections, counsel
20 inmates and impose sanctions for infractions. They also train
21 and assist subordinates.

22 22. Neither Sergeants or Lieutenants have the authority to
23 hire, transfer, suspend, lay-off, recall, promote, discharge,
24 reward, discipline or adjust grievances. They do have authority
25 to direct and assign subordinates to specific tasks. All adverse
26 personnel actions taken by a Sergeant are reviewed immediately by
27 the shift Lieutenant. All such actions taken by a Lieutenant are
28 subjected to a panel review and investigation which makes a recommen-
29 dation to a higher level. When a Lieutenant makes a recommendation
30 to his superior the superior may make his own investigation and
31 determination of the matter.

32 23. The position description form for Correctional Sergeant,

1 which the State wrote for purposes of this unit clarification
2 proceeding, shows that the Sergeants act as lead workers and that
3 they work under close supervision.

4 24. Lieutenants may sit on a hiring panel and/or a promotion
5 board, however, neither the panel or board makes a final decision.
6 The Warden may reject any recommendation.

7 25. Acting Warden Blodgett who had been Deputy Warden for 12
8 years was of the opinion that in most cases the first line supervisor
9 of the Correctional Officers on shift was a Lieutenant.

10 26. The collective bargaining agreement between the parties
11 deals specifically with the procedure to be followed in case of
12 lay-offs or subsequent recalls. It also details job posting and
13 promotion procedures.

14
15 DISCUSSION

16 This is the first of two unit clarification cases filed by the
17 State on August 18, 1980. Because of the similarity of the issue
18 raised in both, most of the discussion here will be pertinent in
19 UC7-80.

20 Section 39-31-103(3) MCA defines the term "supervisory employee"
21 as ". . .any individual having authority in the interest of the
22 employer to hire, transfer, suspend, lay-off, recall, promote,
23 discharge, assign, reward, discipline other employees, having
24 responsibility to direct them, to adjust their grievances, or
25 effectively to recommend such action, if in connection with the
26 foregoing the exercise of such authority is not of a merely routine
27 or clerical nature but requires the use of independent judgment."
28 Such employees are excluded from the coverage of the Collective
29 Bargaining for Public Employees Act.

30 The National Labor Relations Act defines the term the same as
31 does the State (Section 2(11)). The National Labor Relations
32 Board holds that possession of one of the listed powers is sufficient

1 to classify the individual as a supervisor. NLRB v. Metropolitan
2 Life Insurance Co., 405 F.2d 1169, 1173, 70 LRRM 2029 (1968). In
3 addition to actually exercising one or more of the enumerated
4 powers, a person may be excluded as a supervisor if he can effectively
5 recommend a listed power. However, whether in actual performance
6 or in making a recommendation, to be excluded as a supervisor, one
7 must exercise independent judgment. Unimedia Corp, 98 LRRM 1176
8 (1978). Poultry Enterprises, Inc. v. NLRB, 216 F.2d 798, 802, 35
9 LRRM 2151.

10 Since none of the incumbents of the classes of positions
11 involved in this unit clarification proceeding has the authority
12 to hire, transfer, suspend, lay-off, recall, promote, discharge,
13 reward, discipline, or adjust grievances using independent judgment;
14 the question becomes: (1) whether any of them can make effective
15 recommendations in those areas using independent judgment, and (2)
16 whether the assigning and directing done by them requires the use
17 of independent judgment. Although the employer went to great
18 lengths to show a change in organizational structure and in the
19 duties and responsibilities of the subject positions over the last
20 few years, I made no findings in that area because the question to
21 be answered is whether the positions' incumbents are supervisory
22 employees as defined in the Act at the time the evidence was taken
23 at the hearing. What they were or were not earlier is of no
24 consequence. If the evidence shows them to be supervisory, they
25 should be excluded, if it does not, they will remain in the unit.
26 The same reasoning applies to the employer's urging that it has
27 attempted to remove some of these positions from the unit, through
28 negotiations and otherwise, over the last several years. What was
29 attempted previously is not relevant here.

30 The Iowa Supreme Court, in a case involving Captains and
31 Lieutenants on a city fire department, upheld the Iowa Public
32 Employee Relations Board's determination that an effective recommen-

1 dation was one which, under normal policy and circumstances, is
2 made at the chief executive level or below and is adopted by
3 higher authority without independent review or de novo consideration
4 as a matter of course. City of Davenport v. PERB, 264 N.W. 2d
5 307, 98 LRRM 2582 (1978). In NLRB v. McQuaide Inc., 552 F.2d 519,
6 94 LRRM 2950 (1977), the U.S. Court of Appeals upheld an NLRB
7 ruling that assigning employees to work on a routine basis is
8 insufficient to create supervisory status because it does not
9 require the use of independent judgment within the meaning of the
10 statutory definition. See also Phalo Plastics Corp., 127 NLRB
11 170, 46 LRRM 1221 (1960).

12 None of the positions here make effective recommendations on
13 hiring, transferring, suspending, lay-offs, recalls, promotions,
14 firing, rewarding, disciplining or adjusting grievances. Hiring
15 decisions at the prison are made by the Warden. The employees
16 here sit on a panel which makes a recommendation to higher levels
17 in the organization. The final decision is not necessarily an
18 endorsement of even the panel's recommendation and clearly not of
19 any one panel member's choice. There is no evidence on the record
20 that they can make transfers from one shift to another or from one
21 department to another. It is safe to infer they have no effective
22 role in such matters because of the ample evidence showing they
23 play such a minor role in making effective recommendations on
24 other significant personnel actions, e.g., discipline in general
25 and discharge specifically. Merely assigning or directing others
26 to certain locations cannot be said to require the use of independent
27 judgment and, therefore, cannot serve to exclude the possessor
28 from the coverage of the Act. See McQuaide and City of Davenport,
29 supra.

30 A distinction must be made between suspension and sending an
31 employee home pending an independent investigation, determination
32 and review. Some of these employees can do the latter, they

1 cannot do the former. Ultimately the Warden would pass judgment
2 on a suspension. The person who directed the employee to leave
3 the premises would have nothing to say about whether the employee
4 was to be suspended with or without pay nor for what period of
5 time. Nor would they effectively recommend other adverse personnel
6 actions such as discharge or other discipline. Those decisions
7 are reviewed in depth by a committee which makes its own investiga-
8 tions, determination and review. The final decision is made by
9 the Warden. Any recommendation made by the occupants of the
10 positions in question here is reviewed extensively and cannot be
11 considered effective.

12 There is no evidence that there have been lay-offs or recalls
13 at the prison. At any rate, the collective bargaining agreement
14 between the parties precludes any possibility that these employees
15 could make effective recommendations in those matters. The same
16 is true of promotions. The agreement lists certain criteria which
17 must be considered then almost mandates that the senior applicant
18 for a vacant position be selected. The subject employees could
19 have little if any voice in the matter. They do not make effective
20 recommendations on promotions. Again, such decisions are made at
21 a higher level.

22 There is no evidence to show that rewards are made. The very
23 nature of state service proscribes the likelihood that any signifi-
24 cant supervisory actions are taken in this area. Prison employees,
25 like many other state employees, are promoted and advance through
26 the ranks because of job performance; however, that is a separate
27 consideration in the definition and should not be looked upon as a
28 reward per se.

29 The adjustment of grievances and the procedures by which it
30 is accomplished is detailed in the contract. These employees
31 cannot effectively recommend the manner in which grievances are to
32 be adjusted for the same reason they cannot effectively recommend

1 adverse personnel actions. They are far removed from the final
2 decision. Adjusting a grievance involves an inquiry into its
3 validity, a determination on the merits and the taking of corrective
4 action. NLRB v. Browne and Sharpe, Mfg. Co., 169 F.2d 331, 334,
5 22 LRRM 2363 (1948). In NLRB v. City Yellow Cab Co., 344 F.2d
6 575, 59 LRRM 2001 (1965) the sixth Circuit held that preliminary
7 efforts by station commanders to resolve minor grievances did not
8 make them supervisors.

9 The NLRB also considers whether a determination that certain
10 employees are supervisors would create an unrealistic and excessive-
11 ly high ratio of supervisors to employees. Central Service Buying,
12 223 NLRB 77(1976), 92 LRRM 1145; Pinecrest Convalescent Home Inc.,
13 222 NLRB 10(1976), 91 LRRM 1082.

14 The remaining question is whether any of the six classes of
15 positions may be called supervisory because they use independent
16 judgment in assigning and directing others. It must be remembered
17 that the record shows they perform work which is similar to that
18 done by their subordinates and that most of their activities are
19 routine by nature. Except for the Lieutenants, all are at a level
20 barely above the workers and they have approximately the same
21 number of workers below them in the hierarchy (from five to seven).
22 None, except Lieutenants, is ever in charge of the whole facility;
23 none has subordinates who in turn have subordinates. For those
24 reasons, it cannot be said with any degree of certainty that they
25 use independent judgment in assigning and directing the work of
26 others. They are what the NLRB calls "lead workers" or "straw
27 bosses." NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 1051, 96
28 LRRM 3198 (1977). Because of those distinctions between the
29 Lieutenants and the others, I am compelled to conclude that they,
30 the Lieutenants, do use independent judgment in assigning and
31 directing the work of others. They have a much larger group of
32 subordinates; they supervise subordinates who in turn have subordi-

1 nates under them; and, they, at times, are in charge of the whole
2 facility.

3 Consideration of the secondary indicia used by the NLRB in
4 close cases is not necessary or appropriate here because none of
5 the positions, except Lieutenants, satisfies any of the primary
6 criteria listed in the Act.

7
8 CONCLUSIONS OF LAW

9 The Butcher Supervisor II, Ranch Manager I, Mail Clerk Supervi-
10 sor II, Warehouse Foreman II and Correctional Sergeants are not
11 supervisory employees as that term is defined in 39-31-103(3) MCA;
12 Lieutenants are supervisory employees under that definition.

13
14 RECOMMENDED ORDER

15 The appropriate bargaining unit at Montana State Prison
16 represented by the Montana Public Employees Association is modified
17 to the extent that Lieutenants are excluded therefrom.

18
19 NOTICE

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

24
25 DATED this 1st day of September, 1981.

26
27 BOARD OF PERSONNEL APPEALS

28
29
30 By Jack H. Calhoun
31 Jack H. Calhoun
32 Hearing Examiner

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of
this document was mailed to the following on the 1st day of
September, 1981:

Montana Public Employees Association
1426 Cedar Street
Helena, Montana 59601

State Labor Relations Bureau
Department of Administration
Room 130
Sam W. Mitchell Building
Helena, Montana 59620

Jennifer Jacobson

PAD5:M