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APPEALS

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-83:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,

Petitioner,

CITY OF KALISPELL,

Employer.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

On March 14, 1983, this Board received the above-captioned Petition for Unit Clarification asking this Board to determine whether one Assistant Street Superintendent position and one Senior Building Inspector/Plan Reviewer position were included in the unit of City of Kalispell employees represented by Petitioner. Subsequently, the parties attempted to resolve the questions through contract negotiations. On September 22, 1983, the Union notified this Board the parties had reached agreement on the Assistant Street Superintendent position; however, it indicated it wished to reactivate the Petition regarding the Senior Building Inspector/Plan Reviewer position. On October 14, 1983, this Board received the Employer's Answer arguing for exclusion of the Senior Building Inspector/Plan Reviewer position from the bargaining unit.

The hearing in this matter was conducted November 15, 1983, in Kalispell, Montana, under the authority of Title 39, Chapter 31, MCA and ARM 24.26.630(5) and in accordance with the Administrative Procedure Act, Title 2, Chapter 4, MCA. Kathryn Walker was the hearing examiner. George Hagerman, field representative for Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, represented Petitioner. Glen Neier, Kalispell City Attorney, represented the Employer.

Having carefully reviewed the record in this matter, including sworn testimony and evidence, the hearing examiner makes the following findings of fact:

FINDINGS OF FACT

1
2 1. The American Federation of State, County and Municipal Employees,
3 AFL-CIO, Petitioner in this matter, is the exclusive representative of cer-
4 tain employees of the City of Kalispell, Montana. The applicable negotiated
5 agreement between these parties contained the following provisions regarding
6 the bargaining unit:

7 Article I, Recognition. The Employer recognizes the Union as the
8 bargaining agent for the employees of the City of Kalispell, with
9 the exception of the following: Police Officers, Firemen and those
officials and supervisors contained in Addendum "B".

10 Article XXI, Wage Schedule. Wage scales of employees covered under
11 this Agreement are to be found under Addendum "A", which is attached
hereto and thereby made part of this Agreement.

12 According to Addendum "A", the bargaining unit represented by Petitioner
13 included the following classifications: Shop Foreman, Mechanic, Assistant
14 Superintendent Water Works (hourly wage rate: \$9.15), Maintenance - Repair
15 Water Works, Meter Reader - Water Department, Chief Operator - Sewage Plant,
16 Sewer Maintenance Chief, Operator - Sewage Plant, Laboratory Technician -
17 Sewage Plant, Sewer Maintenance Assistant (hourly wage rate: \$8.83), Assis-
18 tant Superintendent Streets (hourly wage rate: \$8.99), Grader Finisher,
19 Grader Operator, Loader Operator, Oil Distributor, Sweeper Operator, Hot
20 Plant Operator, Truck Driver, Garbage Crew, Caretaker - Parks, Laborer,
21 Dog Catcher, Surveyor's Aide, Building Inspector (hourly wage rate: \$8.90),
22 Service/Lubrication Person, Seasonal Laborer, Parking Meter Maintenance,
23 Sign Maintenance, Traffic Signal Maintenance, Building Maintenance Person,
24 City Clerks II, City Clerks I, STEP Investigator, STEP Secretary, Secretary
25 - Dispatcher, Dispatcher II, Dispatcher I, Parking Meter Maid II, Parking
26 Meter Maid I.

27 2. When the hearing in this matter was held, there were three employees
28 in the City of Kalispell's Building Department: the Building Official (re-
29 sponsible for the administration of the department and exempt from the bar-
30 gaining unit represented by Petitioner), the Senior Building Inspector/
31 Plan Reviewer (the subject of this unit clarification), and a secretary who
32 performed typical clerical duties and was a member of the bargaining unit

1 represented by Petitioner.

2 3. The job description for the City of Kalispell's Senior Building
3 Inspector/Plan Reviewer position dated March 8, 1983, stated, in pertinent
4 part:

5 Description of Work: This is a responsible supervisory and admin-
6 istrative position in building code enforcement and zoning adminis-
7 tration.

8 Supervision Received: Works under general supervision of Building
9 Official/Zoning Administrator.

10 Supervisory Authority: Senior Building Inspector has the authority
11 of assigning work to and direct employees under his supervision,
12 assign overtime, adjust grievances and recommend such action to the
13 Building Official, and the exercise of such authority is not merely
14 routine or clerical, but requires the use of independent judgment.
15 Has administrative authority in the absence of the Building Official.

16 Administrative Responsibilities: Examine working drawings and speci-
17 fications for new or remodeled buildings for compliance with zoning
18 ordinances and building, plumbing, mechanical and energy conservation
19 codes.

20 Inspect new or remodeled buildings during construction to insure
21 code and zoning compliance.

22 Inspect existing buildings or fire damaged buildings for structural
23 safety, exiting requirements and define what would need to be done to
24 building to protect life safety.

25 Issue various types of permits and releases pertaining to building
26 codes, zoning and related regulations.

27 Answer inquiries and complaints concerning the application of
28 building codes and zoning and solve the problems.

29 Prepare necessary forms, records, and reports.

30 Performs related work as required.

31 Attends meetings and hearings to represent Building/Zoning Department.

32 Salary: \$17,300 per year.

4. At the time of the hearing in this matter, the incumbent Senior
Building Inspector/Plan Reviewer had been in that position for seven
months. His main duties were to inspect buildings, enforce zoning ordinances,
and issue various permits. He assigned work to and directed the work of a
secretary whom he had helped train and orient.

Since he had assumed the Senior Building Inspector/Plan Reviewer
position he had not hired, fired, rewarded, transferred, or disciplined any
employee. Neither had he been involved in any promotions, layoffs, or griev-
ances (these situations had not come up). No performance evaluations had
been done since he had become the Senior Building Inspector/Plan Reviewer,
but the Mayor testified that he would not do the secretary's performance

1 evaluation even if the Building Official were absent.

2 The Mayor indicated the Senior Building Inspector/Plan Reviewer might
3 serve on an interviewing committee with the Mayor, Department Superintendents,
4 and Building Official if the secretarial position in the Building Department
5 were to become vacant.

6 5. For three to four weeks prior to the hearing in this matter, the
7 Senior Building Inspector/Plan Reviewer had performed the duties of the
8 Building Official who had been away on sick leave.¹ These duties had
9 included administering the Building Department; issuing permits, reviewing
10 plans and specifications, enforcing zoning ordinances, and inspecting
11 buildings; and attending staff and Board of Adjustment meetings.

12 6. At the time of the hearing in this matter, the City of Kalispell's
13 Building Inspector position was vacant and there were no plans to hire for
14 the position unless such action became warranted by increased workload.
15 However, there was a job description for that position which stated, in
16 pertinent part:

17 General Statement of Duties: Performs technical work in the enforce-
18 ment of building codes and in zoning ordinance administration.

19 Supervision Received: Works under general supervision of an admin-
20 istrative superior.

21 Supervision Exercised: Exercises general supervision over technical
22 personnel as assigned.

23 Example of Duties: . . .

24 Assists in planning and enforcing ordinances. Issues various
25 types of permits and releases pertaining to zoning, general building,
26 plumbing, and electrical codes and regulations.

27 Assists in reviewing plans and specifications for building con-
28 struction and alteration to determine their compliance with city
29 codes and regulations.

30 Answers inquiries and complaints concerning the application of
31 building and zoning codes; consults with building contractors and
32 others.

Prepares necessary forms, records, and reports.

Performs related work as required.

¹This absence of the Building Official was out of the ordinary.
Normally, he would only be absent for his annual vacation and about
one week of training per year.

1 7. The job description for the City of Kalispell's Assistant Super-
2 intendent - Water Department stated, in pertinent part:

3 Duties: Assists Superintendent of Water Department in the schedules
4 and daily work load of 10 to 25 men in the Water Works Section. De-
5 termines methods and procedures for water line maintenance, repair
6 and construction. Supervises the operation of the Sewage Disposal
7 Plant. Maintains time sheets for all workers under him. Keeps re-
8 cords of man hours, materials, and equipment time used on all work
accomplished. Orders materials needed. Recognizes and solves prob-
lems in the field as pertains to Water Works Systems. Coordinates
work with other departments, sections and private utilities. Con-
tacts private citizens in regards to accomplishment of duties.

9 Responsibilities: Responsible to see that all men under him are
10 assigned to authorized work programs and that such programs and
11 individual projects are accomplished efficiently, timely, and safely.
12 Responsible for the accuracy of all reports and records prepared and
13 submitted. Responsible for the proper use and operation of all Water
14 Works equipment and vehicles. Responsible for seeing that personnel
15 under him receive appropriate training, commendation and necessary
16 discipline. Responsible for seeing that work which may be disruptive
17 to traffic flow is brought to the attention of the Police and Fire
18 Departments. Responsible for safeguarding public and private utilities
19 during excavation. Responsible for maintaining the quality of city
drinking water within applicable water quality standards.

15 8. The job description for the City of Kalispell's Assistant Street
16 Superintendent dated October 3, 1983, stated, in pertinent part:

17 Description of Work: This is a responsible and skilled work involving
18 the supervision of a crew of five to nine employees engaged in street
19 maintenance and repair work. Schedules work assignments of six men in
the garbage section.

20 Supervision Received: Works under the general supervision of the Street
21 Superintendent.

22 Supervisory Authority: Assistant Street Superintendent has the authority
23 of the Street Superintendent in his absence. Assigning work to and di-
rect employees under his supervision.

24 Examples of Work: Supervises a work crew of five to fifteen employees
25 in the absence of the Superintendent. Employees involved consist of
26 laborers and operators of equipment, such as trucks, roller, gravel and
27 asphalt spreader, oil distributor, jackhammer, grader, street sweeper,
28 loaders and snow removal equipment. Directs and coordinates repair
operations which frequently extend to complete resurfacing of streets
on a block to block basis; determines maintenance or repair techniques,
methods and types of equipment to be utilized; consults with supervisor
to obtain approval for major program changes in procedure; assures that
equipment is properly utilized and receives proper driver maintenance.

29 Maintains records and prepares reports covering employee time and
attendance.

30 Performs related work as required.

31 9. The job description for the City of Kalispell's Assistant Super-
32 intendent - Sewer Maintenance stated, in pertinent part:

1 Duties Involved: Assists Street Superintendent in scheduling
2 daily work activities of 2 - 4 men in Sewerline Maintenance and
3 construction, assists in keeping records of man hours, materials,
and equipment time used on all work accomplished, assists in or-
dering material needed.

4 Responsibilities: Responsible to see that all men under him are
5 assigned to authorized work programs and that such programs and
6 individual projects are accomplished efficiently, timely, and
7 safely. Responsible for safe operation and daily maintenance of
equipment used in sewer line construction and maintenance. Re-
sponsible to insure that approved materials and methods are used.

8 DISCUSSION

9 A supervisory employee, who is excluded from coverage of the Montana
10 Collective Bargaining Act for Public Employees, is defined as:

11 . . . any individual having authority in the interest of the em-
12 ployer to hire, transfer, suspend, lay off, recall, promote,
13 discharge, assign, reward, discipline other employees, having
responsibility to direct them, to adjust their grievances, or
14 effectively recommend such action, if in connection with the
foregoing the exercise of such authority is not of a merely
15 routine or clerical nature but requires the use of independent
judgment. [Sections 39-31-103(2)(b) and 39-31-103(3) MCA.]

16 For guidance in interpreting Montana's collective bargaining statute,
17 the Board of Personnel Appeals often looks to decisions of the National
18 Labor Relations Board, the Board that administers the National Labor Re-
19 lations Act. In this particular matter, the hearing examiner noted that
20 the National Labor Relations Act's definition of "supervisor" is nearly
21 identical to section 39-31-103 MCA. The National Labor Relations Board
22 has consistently held that this definition "is written in the disjunctive,
23 and so just the possession of any one of the listed powers is sufficient
24 to cause the possessor to be classified as a supervisor. . . ." (NLRB
25 v. Metropolitan Life Insurance Co., 405 F.2d 1169, 70 LRRM 2029 (2nd CA,
26 1968). However, in applying this reasoning the National Labor Relations
27 Board carefully distinguishes between true supervisors and subforemen,
28 lead workers, and other minor supervisory employees in order to afford
29 those who are not true supervisors coverage under the Act.

30 The Board of Personnel Appeals outlined some of the major consider-
31 ations in making the distinction between true supervisors and minor
32 supervisory employees in its Billings Firefighters Local 521 v. City of

1 Billings decision (UC 1-77). Some of those considerations are:

- 2
- 3 1. Whether the employee has the independent authority to hire,
4 fire, adjust grievances, discipline, or give raises or other
5 benefits.
- 6 2. Whether the employee's exercise of authority, particularly in
7 the areas of assignment and direction of work, is routine in
8 nature, i.e., follows established procedures.
- 9 3. Whether the employee exercises independent judgment, particu-
10 larly in the areas of directing the activities of others.
- 11 4. Whether the employee's recommendations regarding personnel
12 matters are subject to independent review/investigation by
13 a higher authority.
- 14 5. Whether there are several layers of supervision above the
15 employee.
- 16 6. Whether a substantial amount of the employee's time is spent
17 doing work which is similar to the work of the personnel he/
18 she allegedly supervises.
- 19 7. Whether a determination that the employee in question is super-
20 visory would create an unrealistic and excessively high ratio
21 of supervisors to employees.

22 [Citations omitted.]

23 Using these criteria, the hearing examiner concluded the Senior
24 Building Inspector/Plan Reviewer was not a supervisor. The record did
25 not establish that he had the independent authority to perform any of the
26 functions enumerated in the Act except assigning and directing the work
27 of one secretary. Regarding the responsibility for assigning and directing
28 work, there was no indication this activity didn't follow established pro-
29 cedures or required the exercise of independent judgment.

30 The hearing examiner also considered the structure of the Building
31 Department and the fact that it was a three-person office. She found it
32 highly unlikely that the Senior Building Inspector/Plan Reviewer, along-
side the Building Official, would exercise true supervisory authority over
the sole clerical employee in the office.

Finally, the hearing examiner's determination that the Senior Building
Inspector/Plan Reviewer was not a true supervisor was not affected by the
fact that he had been substituting for the Building Official for several
weeks prior to the hearing, for it is the employee's regular function, not

1 temporary or occasional service as a supervisor, that is determinative of
2 supervisory status. NLRB v. Harmon Industries, Inc., 565 F.2d 1047, 96
3 LRRM 3198 (8th CA, 1977).

4 Neither was the hearing examiner persuaded that the Senior Building
5 Inspector/Plan Reviewer ought to be excluded from the bargaining unit because
6 of managerial status. Section 39-31-103(2)(b) MCA excludes "management
7 officials" from the coverage of Montana's Collective Bargaining Act for Public
8 Employees. Section 39-31-103(4) MCA defines that term as:

9 . . . a representative of management having authority to act for the
10 agency on any matters relating to the implementation of agency policy.

11 This Board has consistently construed this definition very narrowly and
12 has only once ruled that a group of employees were excluded from the Act's
13 coverage due to managerial status. (Decision in the matter of the Field Pro-
14 ject Managers Unit Determination, UD 9-74). While the National Labor Relations
15 Act does not specifically exclude management officials from its coverage, the
16 National Labor Relations Board has developed a body of case law which does
17 provide for such an exclusion. In 1974, the United States Supreme Court
18 stated that the NLRB's exclusion of managerial employees, defined as those
19 who formulate and effectuate management policies by expressing and making
20 operative the decisions of their employers, has been approved by the courts
21 without exception. It also noted with approval that the NLRB excludes from
22 the NLRA as managerial those who formulate, determine, and effectuate an em-
23 ployer's established policy. NLRB v. Textron, Inc., 416 US 267 (1974), 85
24 LRRM 2945. The application of this definition was carefully explained by
25 the NLRB in its 1974 General Dynamics Corporation decision:

26 . . . managerial status is not conferred upon rank-and-file workers,
27 or upon those who perform routinely, but rather is reserved for those
28 in executive-type positions, those who are closely aligned with manage-
29 ment as true representatives of management. Work which is based on
30 professional competence necessarily involves a consistent exercise
31 of discretion and judgment, else professionalism would not be involved.
32 Nevertheless, professional employees plainly are not the same as
managerial employees either by definition or in authority, and mana-
gerial authority is not vested in professional employees merely by
virtue of their professional status, or because work performed in that
status may have a bearing on company direction. Likewise, technical
expertise in administrative functions which may involve the exercise of
judgment and discretion does not confer executive-type status upon the
performer. . . . [General Dynamics Corp., Convair Aerospace Div., 213
NLRB 124 (1974); 87 LRRM 1705.]

1
2 An application of these principles led the hearing examiner to conclude
3 that the Senior Building Inspector/Plan Reviewer did not have managerial
4 status because he did not have sufficient authority and discretion in for-
5 mulating, determining, and effectuating policy.

6 The hearing examiner also noted the Senior Building Inspector/Plan
7 Reviewer position was quite similar in level of responsibility to the po-
8 sitions classified as Assistant Superintendent - Water Department, Assistant
9 Street Superintendent, and Assistant Superintendent - Sewer Maintenance.
10 The hearing examiner could see no reason to exclude the Senior Building
11 Inspector/Plan Reviewer position, especially considering the fact that
12 these other positions are included in the bargaining unit.

13
14 CONCLUSIONS OF LAW

15 The position classified as Senior Building Inspector/Plan Reviewer
16 is not supervisory as that term is defined by section 39-31-103(3) MCA.

17 The position classified as Senior Building Inspector/Plan Reviewer
18 is not managerial as that term is defined by section 39-31-103(4) MCA.

19 RECOMMENDED ORDER

20 The position classified as Senior Building Inspector/Plan Reviewer
21 is properly included in the bargaining unit comprised of City of Kalispell
22 employees represented by Petitioner American Federation of State, County
23 and Municipal Employees, AFL-CIO.

24
25 DATED this 7th day of May, 1984.

26 BOARD OF PERSONNEL APPEALS

27
28 By Kathryn Walker
29 Kathryn Walker
Hearing Examiner

30
31 NOTICE

32 Written exceptions may be filed to these Findings of Fact, Conclusions
of Law, and Recommended Order within twenty days service thereof. If no

1 exceptions are filed with the Board of Personnel Appeals within that
2 period of time, the Recommended Order shall become the Final Order.
3 Exceptions shall be addressed to the Board of Personnel Appeals, Capitol
4 Station, Helena, Montana 59620.

5
6 CERTIFICATE OF MAILING

7 I, Kathryn Walker, hereby certify that on the 7th
8 day of May, 1984, I mailed a true and correct copy of the above Findings of
9 Fact, Conclusions of Law, and Recommended Order to the following:

10 Mr. George Hagerman, Field Representative
11 Montana Council No. 9
12 AFSCME, AFL-CIO
600 North Cooke
Helena, MT 59601

13 Mr. LeRoy McDowell, Mayor
14 City of Kalispell
Kalispell City Hall
15 P.O. Box 1035
Kalispell, MT 59901