

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-84:

STATE OF MONTANA EASTMONT HUMAN )  
SERVICES CENTER, )  
Petitioner, )  
- vs - )  
MONTANA PUBLIC EMPLOYEES )  
ASSOCIATION, )  
Respondent. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Linda Skaar on April 15, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by the Petitioner on May 6, 1985.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, July 31, 1985.

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

- 1. IT IS ORDERED that the Petitioner's Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.
- 2. IT IS ORDERED that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Linda Skaar as the Final Order of this Board.

DATED this 14 day of August, 1985.

BOARD OF PERSONNEL APPEALS

BY Alan L. Joscelyn  
Alan L. Joscelyn  
Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 15 day of August, 1985:

Art McCurdy  
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 59604

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-84

STATE OF MONTANA, EASTMONT	)	
HUMAN SERVICES CENTER	)	
	)	FINDINGS OF FACT;
Petitioner,	)	CONCLUSIONS OF LAW
	)	AND
EASTMONT EDUCATORS	)	RECOMMENDED ORDER
ASSOCIATION	)	
	)	
Respondent.	)	

\* \* \* \* \*

A petition for unit clarification was filed on June 1, 1984 proposing to clarify the unit comprised of developmental training specialists, special education teachers, speech pathologists, recreation specialists, recreation therapists, teacher aides and rehabilitation aides by removing one recreation therapist. Petitioner alleges that new supervisory duties have been added to this position.

A hearing was held in this matter on December 12, 1984 under the authority of Title 39, Chapter 31 and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA. Petitioner, State of Montana was represented by Caleb Mills. Emilie Loring represented the Eastmont Educators Association. Linda Skaar was hearing examiner.

After careful review of testimony and evidence presented at the hearing, I make the following findings of fact:

FINDINGS OF FACT

1. Dallas Scott has been the recreation therapist at the Eastmont Human Services Center for the past three years. As recreation therapist, Scott is in charge of the recreation program. This program unit is responsible for evaluating, planning and conducting recreation programs for severely and profoundly retarded residents. In achieving

1 the goals of the program Ms. Scott supervises the recreation  
2 staff (a recreation assistant and recreation aide) and  
3 coordinates center recreation activities. Specifically, she

4 1) trains and coordinates the staff in therapy  
5 methods and recreation activities. This consumes  
6 30% of her time.

7 2) plans, organizes and carries out recreation  
8 activities for the residents. These activities  
9 include motor therapy, classroom programming,  
10 outings, special events, graphs and social skill  
11 programming. This takes 70% of her time.

12 Scott's position was at the grade 13 level until the  
13 Classification Bureau reviewed and consolidated the Recre-  
14 ation Therapist series into a single class at a grade 14.  
15 In response to this change in classification Superintendent  
16 Sylvia Hammer determined to add supervisory duties to Ms.  
17 Scott's position. To this end, management filled out a new  
18 position description for Ms. Scott. This position descrip-  
19 tion is almost word for word a copy of the previous position  
20 description. There were no supervisory duties added to the  
21 list of duties of the position. The only substantive  
22 changes were the addition of the following:

23 (added to the response to the question on supervision  
24 received)

25  
26 Reference materials include Eastmont Human Ser-  
27 vices Center Personnel Handbook and Student Rights  
28 Manual, Boulder River School and Hospital Behavior  
29 Management Manual, and Eastmont Human Services  
30 Center Reference Library with evaluation mate-  
31 rials.

32 (added to the response to the question on required  
knowledges, skills and abilities).

. . .skill in providing gross motor therapy to  
severely and profoundly handicapped and consulting  
effectively with the physical therapist and  
occupational therapist as need be. Working



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

developing the documentation upon which the decision will be made. However, several people would review the recommendation and the back-up material.

8. Ms. Jessen testified that Ms. Scott has the authority to recommend a promotion but that promotions are tied to the hiring process.

9. Ms. Jessen testified that Ms. Scott will have the authority to recommend lay-off and recall.

10. Ms. Scott substitutes for Ms. Jessen when she is absent from the center. Ms. Jessen testified that she is absent from the Center some every quarter and that her absences in the past year are typical. She was gone approximately a week in June, ten days in August and two or three days during the fall. Ms. Jessen testified, "That was one of the things that we felt would be helpful when the issue of adding that duty came up. There are a lot of schedule changes that have to go on day in and day out and...there is no way that I could leave enough detailed memos, 'if so and so is gone send that resident to such and such a place.' We felt it would improve the operation of the Education Department..." Here Ms. Jessen was referring to mandated ratios between residents and staff, staffing and programmatic problems caused by residents being "pulled-out" for treatment elsewhere in the Center.

In Jessen's absence, Scott has the authority to call in substitutes or she can juggle staff and patients. Ms. Jessen does not believe that Scott has called in any substitutes since her upgrade to a grade 14.

11. Management plans to have Ms. Scott evaluate employees. However, the agreement covering the employees in the Education Department specifies that employee performance evaluation will be done by the Education Director.

1  
2 12. Ms. Scott cannot adjust employee grievances. The  
3 contract provides that all such grievances will go to the  
4 Superintendent.

5 13. While Scott was sent to a single training session  
6 for supervisory personnel she does not ordinarily attend  
7 meetings held for supervisory personnel nor is she regarded  
8 as a supervisor by other employees.

#### 9 DISCUSSION

10 The definition of supervisory employee contained in  
11 Montana's Collective Bargaining Act for Public Employees

12 means any individual having authority in the  
13 interest of the employer to hire, transfer,  
14 suspend, lay off, recall, promote, discharge,  
15 assign, reward, discipline other employees, having  
16 responsibility to direct them, to adjust their  
17 grievances, or effectively to recommend such  
18 action, if in connection with the foregoing the  
19 exercise of such authority is not of a merely  
20 routine or clerical nature but requires the use of  
21 independent judgment. [emphasis added] 39-31-  
22 103(3) MCA.

23 In determining supervisory status, the responsibilities  
24 of hiring, transferring etc. are considered as a whole.  
25 That is, to be determined supervisory an employee must  
26 exercise a number of the responsibilities listed above.

27 This case is complicated by the fact that the Eastmont  
28 Human Services Center is a health care institution. At the  
29 time that Congress brought non-profit hospitals under the  
30 National Labor Relations Act the Senate Committee on Labor  
31 and Public Welfare considered the problem of supervisory  
32 status of health care professionals. The committee  
reported:

#### 33 SUPERVISORS

34 Various organizations representing health  
35 care professionals have urged an amendment to  
36 Section 2(11) of the Act so as to exclude such  
37 professionals from the definition of "supervisor".  
38 The Committee has studied this definition with  
39 particular reference to health care professionals,

1 such as registered nurses, interns, residents,  
2 fellows, and salaried physicians and concludes  
3 that the proposed amendment is unnecessary because  
4 of existing Board decision. The Committee notes  
5 that the Board has carefully avoided applying the  
6 definition of "supervisor" to a health care  
7 professional who gives direction to other employ-  
8 ees in the exercise of professional judgment,  
9 which direction is incidental to the profession-  
10 al's treatment of patients, and thus is not the  
11 exercise of supervisory authority in the interest  
12 of the employer. The Committee expects the Board  
13 to continue evaluating the facts of each case in  
14 this manner when making its determinations.  
15 [Emphasis added].<sup>1</sup>

16 The Board of Personnel Appeals has adapted this  
17 standard and like the NLRB, it will apply the standard to  
18 health care professionals who are not strictly medical  
19 personnel.<sup>2</sup> The traditional indices of supervision will be  
20 weighed to see whether they are being exercised in the  
21 interest of the employer or in the interest of the treatment  
22 of the patients.

23 An examination of those supervisory duties which  
24 Ms. Scott might exercise "in the interest of the employer"  
25 rather than "in the interest of the patient" shows that her  
26 recommendations on the most important ones would be thor-  
27 oughly reviewed before being implemented. For example, she  
28 may sit on a hiring committee but her vote on an applicant  
29 would have no more weight than the vote of any other member  
30 of the committee. While she might recommend that an employ-  
31 ee be suspended, if possible, her supervisor would conduct  
32 an independent investigation before she acted. In addition,  
if Scott were to recommend the termination of an employee

---

<sup>1</sup>Coverage of Nonprofit Hospitals Under the National  
Labor Relations Act, S. Report 93-766, 93rd Congress, 2d  
session, April, 2, 1974.

<sup>2</sup>Trailback, Inc., 221 NLRB 527, 91 LRRM 1037 (1975).

1 her recommendation would be thoroughly reviewed before  
2 action was taken. Formal grievances must go to the  
3 Superintendent.

4 Ms. Jessen testified that Ms. Scott will be evaluating  
5 employees. However, the contract provides that performance  
6 evaluations will be done by Jessen as Director of Education.  
7 This contract provision will have to be changed before Ms.  
8 Scott can assume this duty.

9 The Position Description form on Ms. Scott's position  
10 completed by her supervisor states that Ms. Scott spends 70%  
11 of her time planning, organizing and carrying out recreation  
12 activities for the residents. Another 30% of her time is  
13 spent training and coordinating the staff in therapy methods  
14 and recreation activities. Even assuming that not all of  
15 her time is spent on these two categories of duties, it is  
16 clear that most of her time is spent working alongside the  
17 recreation assistant and the recreation aide. The NLRB  
18 consistently holds that employees who spend most of their  
19 time working alongside other employees are not supervisors  
20 within the meaning of the act.<sup>1</sup> While working alongside of  
21 the recreation assistant and recreation aide the work that  
22 Ms. Scott does in assigning and directing them is done "in  
23 the interest of the patient". When Scott substitutes for  
24 Jessen her work "in the interest of the patient" is  
25 broadened to include the Education Department as a whole  
26 rather than just the recreation unit. Even without the  
27

28  
29  
30 <sup>1</sup>Cousins Associates, Inc., 125 NLRB No. 15, 1063,  
31 enf'd. CA 2, 46 LRRM 3045 (1960), Aspen Skiing Corporation,  
32 Case No. 27-RC-2389, 143 NLRB No. 76, 53 LRRM 1397, July 22,  
1963, Hamilton Tool Co., 61 NLRB 1361, 16 LRRM 156 (1945),  
Legion Utensils Co., 109 NLRB, No. 187, 34 LRRM 1580  
(1954).

1 distinction between "the interests of the patient" and the  
2 "interests of the employer", spasmodic and infrequent  
3 assumption of a position of command and responsibility does  
4 not transform an otherwise rank and file worker into a  
5 "supervisor."<sup>2</sup>

6 Applying the various tests for supervisory status to  
7 Ms. Scott's job duties show that in the main, the superviso-  
8 ry duties she performs are either performed "in the interest  
9 of the patient", sporadically, or are reviewed to the extent  
10 that Ms. Scott must be considered a leadworker or a  
11 supervisor "in the interest of the patient" rather than "in  
12 the interest of the employer".

13 The determination of whether this position is super-  
14 visory "in the interests of the employer" is not a deter-  
15 mination of the value of the position. Ms. Scott performs  
16 significant duties assigning and directing employees "in the  
17 interest of the patients". She may continue to do so  
18 without affecting her status as a member of the bargaining  
19 unit.

20  
21 CONCLUSION OF LAW

22 The position of recreation therapist now held by Dallas  
23 Scott is not a supervisory position within the meaning of  
24 39-31-103(3) MCA.

25 RECOMMENDED ORDER

26 The petition to exclude the position of recreation  
27 therapist from the bargaining unit of developmental training  
28 specialists, special education teachers, speech  
29

30  
31  
32 

---

<sup>2</sup>NLRB v. Quincy Steel Casting Co., CA 1, 31 LRRM 2148  
(1952).

1 pathologists, recreation specialists, recreation therapists,  
2 teacher aides and rehabilitation aides is dismissed.

3 NOTICE

4 Written exceptions to these Findings of Facts, Con-  
5 clusions of Law and Recommended Order may be filed within  
6 twenty days. If no exceptions are filed with the Board of  
7 Personnel Appeals within that time, the Recommended Order  
8 shall become the Order of the Board. Exceptions shall be  
9 addressed to the Board of Personnel Appeals, Capitol Sta-  
10 tion, Helena, MT 59620.

11 Dated this 15<sup>th</sup> day of April, 1985.

12 BOARD OF PERSONNEL APPEALS

13  
14 By Linda Skaar  
15 LINDA SKAAR  
16 Hearing Examiner

17 \* \* \* \* \*

18 CERTIFICATE OF MAILING

19 I, Linda Skaar, do certify that a true  
20 and correct copy of this document was mailed to the follow-  
ing on the 15<sup>th</sup> day of April, 1985.

21 Labor Relations Bureau  
22 Department of Administration  
23 Room 130, Mitchell Building  
24 Helena, MT 59620

25 Emilie Loring  
26 Hilley & Loring, P.C.  
27 121 4th Street North  
28 Suite 2 G  
29 Great Falls, MT 59401

30  
31 BPA3:015:bd  
32