

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 5-85:

|                                 |                     |
|---------------------------------|---------------------|
| STATE LABOR RELATIONS BUREAU )  |                     |
| ON BEHALF OF THE MONTANA )      |                     |
| HISTORICAL SOCIETY, )           |                     |
| ) Petitioner, )                 | FINDINGS OF FACT;   |
| ) and )                         | CONCLUSIONS OF LAW; |
| ) )                             | RECOMMENDED ORDER   |
| MONTANA FEDERATION OF STATE )   |                     |
| EMPLOYEES, MFT, AFT, AFL-CIO, ) |                     |
| ) Respondent. )                 |                     |

\* \* \* \* \*

A hearing to determine whether the position of Archivist II (Position No. 72) in the Archives and Library Division of the Montana Historical Society is properly a member of the bargaining unit of employees of the Montana Historical Society or whether the position should be excluded because of supervisory status was held on February 11, 1986. The hearing was held under the authority of Section 39-31-207 MCA and ARM 24.26.630(5) and in accordance with the Administrative Procedures Act, Title 2, Chapter 4, MCA. Petitioner was represented by Doug Denler of the State Labor Relations Bureau, Department of Administration. Respondent was represented by Mike Dahlem. Linda Skaar was hearing examiner.

Having carefully reviewed the record, including sworn testimony and evidence, these are my findings of fact:

FINDINGS OF FACT

1. During the past two years, the Montana Historical Society has been in the process of administrative

1 reorganization. Previously the Society operated under a  
2 "program structure" where the head of each separate program  
3 reported directly to the Director of the Society. Under the  
4 new structure, individual program managers report to  
5 division heads who report to the Director.

6 The reorganization of the Archives and Library Division  
7 is scheduled to be completed in September, 1986, when a new  
8 librarian is hired to head the library program. Administra-  
9 tively, the Division will then be organized into 3 separate  
10 but equal programs: library, archives and photo-archives.  
11 Prior to the reorganization, photo-archives was a  
12 sub-program under Archives.

13 Robert N. Clark is head of the Archives and Library  
14 Division. At the time of the hearing he also functioned as  
15 Librarian, heading the library program.

16 2. Delores J. (Lory) Morrow has been photo-archivist  
17 at the Montana Historical Society for the past 12 years.  
18 She now heads the Photo-Archives Program in the Archives and  
19 Library Division. Prior to the recent reorganization, she  
20 headed the photo-archives unit of the Archives Program.

21 Presently, Ms. Morrow supervises two employees: a  
22 photographer and a library technician. The number of  
23 employees in the unit has varied over the years and Ms.  
24 Morrow has hired quite a number of employees. Due to lack  
25 of turnover, the last person she hired was the photographer.  
26 He was hired 4 years ago.<sup>1</sup>

27 Although she works alongside of the other employees in  
28 photo-archives, Ms. Morrow assigns and schedules their work,  
29 signs their time sheets, approves sick leave and vacation,  
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31 <sup>1</sup>Although all the hiring she has done was in the form  
32 of a recommendation, her decision was never questioned.

1 and authorizes the photographer to work "comp time" when  
2 necessary.<sup>2</sup> Over time she has modified the duties of both  
3 jobs. The two employees under her guidance think of her as  
4 a supervisor.

5 When the photographer was preparing to appeal his  
6 classification, Ms. Morrow rejected the first draft of his  
7 position description because she did not believe it accu-  
8 rately represented his duties. After it was revised she  
9 approved it and supported his re-classification.

10 3. Part of the work of photo-archives is integrated  
11 into the work of the rest of the Society. This integration  
12 of work causes Ms. Morrow to spend some of her time "talking  
13 to other people about using my people in different proj-  
14 ects." Combined with direct supervisory responsibilities,  
15 this non-production work can take up to 50% of Ms. Morrow's  
16 time.

17 4. Ms. Morrow has never transferred, suspended,  
18 laid-off or recalled an employee. She believes that she has  
19 the authority to recommend the termination of an employee  
20 for cause.

21 5. Under the new organizational scheme, Ms. Morrow  
22 will be managing a small budget, will be doing more planning  
23 and will do performance appraisals on her staff.<sup>3</sup>

24 Robert Clark testified that Ms. Morrow will be evalu-  
25 ated for her managerial performance; that she will have more  
26 supervisory duties in the future and will be able to  
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28  
29 <sup>2</sup>Ms. Morrow and the library technician work closely  
together and each knows what the other is doing.

30 <sup>3</sup>Until this time, the Historical Society has not done  
31 performance appraisals. Ms. Morrow and others who supervise  
32 employees have recently been trained to do performance  
appraisals and will be doing them in the future.

1 exercise her judgment and to effectively recommend in areas  
2 such as hiring.

3 6. Presently, there are approximately 37 or 38  
4 employees in the bargaining unit at the Historical Society.  
5 There are approximately 6 positions excluded from the unit.

6 DISCUSSION

7 This case was brought on by the reorganization of the  
8 Administrative structure of the Montana Historical Society.  
9 The NLRB has long since recognized that such legitimate  
10 changes may require the alteration of an established  
11 bargaining unit. Frito-Lay Inc., 177 NLRB No. 85, 71 LRRM  
12 1442 (1969); Mahoning Mining Co., 61 NLRB 792, 16 LRRM 110  
13 (1945). Here, the Society which has been reorganizing for  
14 the past two years requests the exclusion of a single  
15 position because of its supervisory status.

16 Section 39-31-103 MCA defines a supervisor as one who  
17 has the authority "in the interest of the employer to hire,  
18 transfer, suspend, lay off, recall, promote, discharge,  
19 assign, reward, discipline other employees, having respon-  
20 sibility to direct them, to adjust their grievances, or  
21 effectively recommend such action, if in connection with the  
22 foregoing the exercise of such authority is not of a merely  
23 routine or clerical nature but requires the use of independ-  
24 ent judgment."

25 For a number of years Ms. Morrow has recommended the  
26 hiring of all employees in photo-archives. In addition to  
27 doing the hiring she also assigns their work, signs their  
28 time sheets, approves vacation and authorizes "comp time"  
29 for the photographer. The question then becomes whether she  
30 exercises this authority using independent judgment or  
31 whether her actions are merely of a routine or clerical  
32 nature. Cases where the Board of Personnel Appeals and the

1 National Labor Relations Board have examined an employee's  
2 use of independent judgment in carrying out putative super-  
3 visory functions are legion. UC #6-80, Labor Relations  
4 Bureau v. MPEA (1981); UC #7-80, Labor Relations Bureau v.  
5 MPEA (1981); Goldies, Inc. v. NLRB, 628 F.2d 706, 105 LRRM  
6 2625 (CA 1, 1980).

7 In NLRB v. McQuaide Inc., 555 F.2d 519, 94 LRRM 2950  
8 (1977), the U.S. Court of Appeals upheld an NLRB ruling that  
9 assigning employees to work on a routine basis is insuffi-  
10 cient to create supervisory status because it does not  
11 require the use of independent judgment within the meaning  
12 of the statutory definition. See also Phalo Plastics Corp.,  
13 127 NLRB No. 170, 46 LRRM 1221 (1960).

14 In this case the testimony on the record does not  
15 clearly establish that Ms. Morrow's direction of the employ-  
16 ees in the unit has not been merely routine with the  
17 non-photographic work divided between Ms. Morrow and the  
18 Library Technician. However, Ms. Morrow's unrefuted testi-  
19 mony clearly establishes that for a number of years she has  
20 exercised independent judgment in making hiring decisions.  
21 Her recommendations on hiring personnel have never been  
22 questioned. Division head Robert Clark states that in the  
23 future Ms. Morrow will have more supervisory duties and will  
24 continue to be able to hire her own people.

25 The hiring authority she has exercised in the past  
26 combined with plans for her continued authority in this area  
27 indicate that Ms. Morrow should not be part of the bargain-  
28 ing unit. The fact that it has been a number of years since  
29 Ms. Morrow exercised her hiring authority is immaterial.  
30 She has exercised such authority in the past and will  
31 exercise it again when the occasion arises.

1           In addition to questioning whether Ms. Morrow actually  
2 exercises independent judgment in the performance of her  
3 supervisory duties, the union raises the issue of the ratio  
4 of supervisors to employees within the bargaining unit.  
5 Both the Board of Personnel Appeals and the National Labor  
6 Relations Board have long held that an abnormal ratio of  
7 supervisors to employees can be a factor in distinguishing  
8 between true supervisors and minor supervisory employees.  
9 UC #1-77, Billings Firefighters Local 521 v. City of Bill-  
10 ings (1979); UD #29-79, Teamsters v. Flathead Valley Commu-  
11 nity College (1980); UD #14-80, Teamsters and City of  
12 Missoula (1980); Pinecrest Convalescent Home, 222 NLRB No.  
13 10, 91 LRRM 1082; Central Buying Service, 223 NLRB No. 77,  
14 92 LRRM 1145 (1976); Commercial Fleet Wash, Inc., 190 NLRB  
15 No. 63, 77 LRRM 1156 (1971).

16           The ratio of supervisors to employees can be examined  
17 in two ways: 1) ratio of supervisors to employees in the  
18 bargaining unit and 2) the ratio of supervisors to employ-  
19 ees in the Photo-Archives Program unit. Firstly, the ratio  
20 of 6 or 7 supervisors to the 37 or 38 employees in the  
21 overall Historical Society Bargaining unit is much lower  
22 than the ratios which the NLRB found improper. In Central  
23 Buying Service, supra, the NLRB found a ratio of 3 "supervi-  
24 sors" to 6 to 8 employees was improper, in Commercial Fleet  
25 Wash, supra, a ratio of 8 "supervisors" to 9 employees, and  
26 in Pinecrest Convalescent Home, a ratio of 10 "supervisors"  
27 to 27 employees was not proper. However, the ratio of  
28 supervisors to employees is only one factor determining  
29 supervisory status and when duties indicate supervisory  
30 responsibility, the NLRB has held that individuals who  
31 supervise only a single employee are supervisors within the  
32 meaning of the Act. In a situation which was similar to the

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one at hand, the NLRB found that an individual who had only one employee assisting him was a supervisor where he 1) interviewed the employee and responsibly directed his day-by-day activity; 2) he apparently was the only person to whom the employee reported for work assignments and directions and 3) his authority remained the same over a period of time, and he admittedly had supervisory authority at the end of that period. Holland & Son, 237 NLRB 263, 99 LRRM 1432 (1978). See also Cartwright Hardware Co., 229 NLRB 781, 95 LRRM 1262 (1977), modified on other grounds, 600 F.2d 268, 101 LRRM 2652 (CA 10, 1979).

Lory Morrow uses independent judgment and effectively recommends those to be hired in the photo-archives unit of the Montana Historical Society. In addition, she assigns and schedules work, signs time sheets and approves sick and vacation leave. Ms. Morrow is a supervisor and her position should be excluded from the bargaining unit.

CONCLUSION OF LAW

Position #72, classified as Archivist II presently occupied by Delores J. Morrow is supervisory as that term is defined by Section 39-31-103(3) MCA.

RECOMMENDED ORDER

Position #72, classified as Archivist II in the Archives and Library Division of the Montana Historical Society presently occupied by Delores J. Morrow is excluded from the bargaining unit of all employees of the Montana Historical Society.

DATED this 9th day of September, 1986.

BOARD OF PERSONNEL APPEALS

By Linda Skaar  
LINDA SKAAR  
Hearing Examiner

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 9th day of September, 1986.

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