

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 4-90:

MONTANA FEDERATION OF STATE )	
EMPLOYEES, MFT, AFT, AFL-CIO, )	
)	
Petitioner, )	
)	
vs. )	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND
DEPARTMENT OF INSTITUTIONS, )	RECOMMENDED ORDER
WOMEN'S CORRECTIONAL CENTER, )	
)	
Respondent/Employer.)	

\* \* \* \* \*

I. INTRODUCTION

A formal hearing in the above-captioned matter was conducted on November 7, 1990, in Warm Springs, Montana before Stan Gerke, Hearing Examiner. The hearing was conducted under the authority of Section 39-31-207 MCA, pursuant to ARM 24.26.630 and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

The Petitioner was represented by Dan Evans, Field Representative, Montana Federation of State Employees, MFT, AFT, AFL-CIO. The Respondent/Employer was represented by Steve Johnson, Chief, Labor Relations and Employee Benefits Bureau, State Personnel Division, Department of Administration. Witnesses included Denise Jancic, Correctional Officer Supervisor, Steven MacAskill, Facility Manager, Shawn O'Brien, Correctional Lieutenant, and Tom Gooch, Administrator, Employee and Labor Relations, Department of Institutions. Subsequent to the hearing, the Parties submitted post-hearing briefs.

II. BACKGROUND

On June 4, 1990, the Petitioner filed a petition with this Board for Unit Clarification of the bargaining unit. The Petitioner contended that Correctional Officer Supervisors should be included in the existing bargaining unit comprised of all

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Correctional Officer I's and Correctional Officer II's working for the employer, excluding all supervisory, managerial, and confidential employees.

On June 26, 1990, the Respondent/Employer filed a response with this Board disagreeing with the Petitioner as to the composition of the bargaining unit. The Respondent/Employer contended the position of Correctional Officer Supervisor meets the definition of "supervisory employees" contained in Section 39-31-103(3) MCA and therefore are appropriately excluded from the bargaining unit.

### III. ISSUE

Whether the Correctional Officer Supervisors should be included in the existing bargaining unit comprised of all Correctional Officer I's and Correctional Officer II's working for the employer, excluding all supervisory, managerial, and confidential employees.

### IV. FINDINGS OF FACT

1. The Women's Correctional Center (hereafter the W.C.C.) is operated by the Department of Institutions, State of Montana. The W.C.C. basically consists of two inmate housing units located at Montana State Hospital, Warm Springs, Montana.

2. At time of hearing, there were 31 employees and 61 inmates at the W.C.C.

3. Approximately six months prior to the hearing, the class specification of Correctional Officer Supervisor, class code 372015, grade 12 was developed and implemented by request of the W.C.C. Three employees who were classified as Correctional Officer II, class code 372011, grade 10, were promoted the class of Correctional Officer Supervisor.

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4. Prior to the development and implementation of the Correctional Officer Supervisor class, the supervisory structure of W.C.C. included the Facility Manager (similar to the Warden's position at the Mens' Prison) and the lone Correctional Lieutenant.

5. At time of hearing, all three employees recently promoted to Correctional Officer Supervisor had been in the position for less than six months and were still in probationary status. Additionally, the three new incumbents had not begun performing all of the supervisory duties listed on the recently developed position description of Correctional Officer Supervisor. As the employees receive training, they will exercise corresponding supervisory duties.

6. While working their respective shifts, the Correctional Officer Supervisors are considered as the supervisor in charge. The Correctional Lieutenant works Monday through Friday, 8:00 a.m. to 5:00 p.m. and during the remainder of the seven day - 24 hour period a Correctional Officer Supervisor is the only supervisor on duty.

7. The Correctional Officer Supervisor participates on hiring/selection committees. However, there is no evidence that the Correctional Officer Supervisor position can, in and by itself, effectively recommend the hiring of any particular applicant.

8. Any authority to layoff or recall employees has not been discussed with the Correctional Officer Supervisors.

9. The evidence does not indicate the Correctional Officer Supervisors have authority, or effective recommendation, to promote or reward other employees or to adjust employee grievances.

10. The Correctional Officer Supervisor has authority to monitor the duties performed by other employees (Correctional Officer II's and, if any, Correctional Officer I's). Should the

1 Correctional Officer Supervisor determine the duties were not being  
2 performed in a satisfactory manner, a counseling session would be  
3 conducted with the particular employee. Depending on the result of  
4 such discussion, the Correctional Officer can initiate disciplinary  
5 procedures. No evidence indicates the Correctional Officer  
6 Supervisor could, by his or her discretion, suspend or discharge  
7 employees as a result of disciplinary action.

8 11. During the assigned shift, the Correctional Officer  
9 Supervisor does direct the work force. Much of the direction is  
10 governed by established procedures and policy. Such strict  
11 policies and procedures are understandably necessary in a  
12 correctional facility. The Correctional Officer Supervisor does,  
13 with use of independent judgment, assign specific work duties to  
14 employees and transfers employees between housing units at the  
15 W.C.C.

16 V. DISCUSSION

17 The Petitioner argues that the incumbents of the newly created  
18 Correctional Officer Supervisor position do not perform the  
19 supervisory duties described and intended for that position. At  
20 time of hearing the Petitioner's argument was correct to a large  
21 degree. The Respondent/Employer admitted the incumbents of the  
22 Correctional Officer Supervisor would gradually increase exercising  
23 supervisory duties as they receive training. However, and at time  
24 of hearing, the evidence shows the Correctional Officer Supervisor  
25 position does direct other employees and uses independent judgment  
26 while making specific work assignments.

27 Section 39-31-103 MCA exempts "supervisory employees" from the  
28 definition of an "employee" covered by the Collective Bargaining  
29 Act For Public Employees. A "supervisory employee" is defined:

30 ...Any individual having authority in the interest of the  
31 employer to hire, transfer, suspend, layoff, recall,

1 promote, discharge, assign, reward, discipline other  
2 employees, having responsibility to direct them, to  
3 adjust their grievances, or effectively to recommend such  
4 action, if in connection with the foregoing the exercise  
5 of such authority is not of a merely routine or clerical  
6 nature but requires the use of independent judgment.

7 Similar language is found in the National Labor Relations Act  
8 at 29 U.S.C. 151(11).

9 The Montana Supreme Court has the approved the practice of the  
10 Board of Personnel Appeals in using Federal Court and National  
11 Labor Relations Board precedence as guidelines for interpreting the  
12 Montana Collective Bargaining for Public Employees Act as the State  
13 Act is similar to the Federal Labor Management Relations Act, State  
14 ex. rel. Board of Personnel Appeals v. District Court, 183 Mont.  
15 223 (1979) 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No 45 v.  
16 State ex. rel. Board of Personnel Appeals, 195 Mont. 272 (1981),  
17 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young (III),  
18 683 P.2d 185 (1984), 119 LRRM 2682.

19 The existence of or exercise of any one of the authorities  
20 enumerated in the above definition of supervisory employee combined  
21 with the use of independent judgment is sufficient to make a  
22 determination of supervisory status regardless of how seldom the  
23 authority is exercised. George C. Foss Company vs. NLRB, 752 F.2d  
24 1407, 118 LRRM 2746, CA 9 (1985). The incumbent Correctional  
25 Officer Supervisors have authority to direct, assign, and transfer  
26 other subordinate employees. Such exercise of authorities is made  
27 at times with the use of independent judgement. Additionally, the  
28 Correctional Officer Supervisors have authority to counsel others  
29 regarding work performance and can initiate disciplinary  
30 procedures.

#### 31 VI. CONCLUSIONS OF LAW

32 1. The Board of Personnel Appeals has jurisdiction in this  
matter pursuant to Section 39-31-202, MCA. Billings Montana vs

1 Fire Fighters Local 529, 113 LRRM 3324, 651 P.2d 627, Montana  
2 Supreme Court 1982.

3 2. The Correctional Officer Supervisors fall within the  
4 definition of supervisory employee [Section 39-31-103(3) MCA] and,  
5 therefore, are excluded from the Collective Bargaining Act For  
6 Public Employees.

7 VII. RECOMMENDED ORDER

8 IT IS ORDERED Unit Clarification No. 4-90 be dismissed.

9 Dated this 18<sup>th</sup> day of April, 1991.

10 BOARD OF PERSONNEL APPEALS

11 By: Stan Gerke

12 STAN GERKE  
13 Hearing Examiner

14 SPECIAL NOTICE

15 In accordance with Board's Rule ARM 24.25.107(2), the above  
16 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
17 written exceptions are filed within 20 days after service of these  
18 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon  
19 the Parties.  
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CERTIFICATE OF MAILING

1 I, Donald K. Kuehn, do hereby certify  
2 that a true and ~~correct~~ copy of this document was mailed to the  
3 following on the 10<sup>th</sup> day of April, 1991.

4 Dan Evans, Field Representative  
5 Montana Federation of State Employees  
6 P.O. Box 1246  
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8 Steve Johnson, Chief  
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