

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 8-94:

CITY OF GREAT FALLS, GREAT)	
FALLS, MONTANA,)	
)	
Petitioner,)	FINDINGS OF FACT;
)	CONCLUSION OF LAW;
vs.)	AND ORDER
)	
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL #8,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

The requested, in-person hearing in this matter was heard in Great Falls on May 23 and May 24, 1995, before Hearing Officer Stephen L. Wallace. David V. Gliko, City Attorney, represented the Petitioner. Timothy J. McKittrick, Esquire, represented the Respondent. Sworn testimony was received from: James Hirose, Fire Chief; Richard Meisinger, former Fire Chief; John Lawton, City Manager; Linda Williams, City Personnel Director; Robert Jones, Police Chief; Wayne Young, Deputy Fire Chief; Talbert Bryan, Engineer; Howard Clos, Captain; Charles Rovreit, Engineer; and Dean Mora, Battalion Chief; and Ron Meyers, Engineer.

In contrast to many hearings before the Department which are specifically exempted from the statutory and common law rules of evidence, this hearing comes under Montana's Administrative Procedure Act (Section 2-4-601, et. seq., MCA) pursuant to Section 39-31-105, MCA. The parties' proposed exhibits were offered one at a time during the hearing, with foundation laid, and some voir dire, as noted in the transcript of these proceedings.

1 In actual sequence, the Petitioner's proposed Exhibit C was
2 admitted without objection. Petitioner's Exhibits A and B were
3 admitted over relevancy objections, noting these documents reflect
4 the opinions of John Lawton, rather than necessarily being factual
5 accounts of labor negotiations contained therein (See Transcript,
6 hereinafter "TR" at 13 - 15). Exhibit D {Petitioner's response to
7 an Unfair Labor Practice charge} was admitted over relevancy
8 objections, with the proviso that the parties had signed a
9 stipulation of DISMISSAL WITH PREJUDICE, and the initial ULP, as
10 protected activity, did not substantiate "conflict" to the degree
11 alleged by the Petitioner.

12 Petitioner's Exhibit E was admitted without objection.
13 Petitioner's Exhibit F was admitted over the hearsay and
14 speculation objections, as the affiant, John Lawton, was present to
15 testify. Exhibit F was admitted with the specific notation that
16 Exhibit F contains John Lawton's speculation on union "motivation"
17 and what the union "clearly understood." Petitioner's Exhibits G,
18 H, I, J, K and L were admitted over continuing foundation
19 objections; Exhibits G, H, I, J, K and L consist of the
20 Petitioner's compilations of December 21, 1992, January 13, 1993,
21 March 8, 1993, July 12, 1993, March 13, 1993, and July 11, 1994,
22 minutes/notes of Battalion Chiefs' (hereinafter "BCs") meetings of
23 those dates, and are not notes generated by the BC's themselves.
24 Exhibits J, K and L also contain hand-written notes made after
25 those meetings by Jim Hirose.

26 The Petitioner's proposed Exhibits N and O were admitted over
27 hearsay objections, as both Dean Mora and Wayne Young were to
28 testify, and did testify concerning Exhibits N and O, which they

1 authored, respectively. Petitioner's Exhibits P, Q and R were
2 admitted over relevancy objections, as they were offered to address
3 the BCs' alleged failure to exercise initiative in disciplinary
4 matters. Petitioner's proposed Exhibit S and its three hand-
5 written attachments were admitted over relevancy objections with
6 the proviso that this affidavit of Jim Hirose contains Mr. Hirose's
7 personal understanding of what the union understood during the last
8 contract negotiations.

9 Petitioner's proposed Exhibit U was admitted over relevancy
10 objections. Exhibit U consists of the current Fire Chief/Emergency
11 Services Coordinator's position description as revised at the
12 Petitioner's request by Carl Becker and Company. Petitioner's
13 Exhibit V was admitted over the objection that this Petitioner-
14 adopted and currently effective job description for the BC's was
15 never negotiated with the union and represented a unilateral change
16 in terms and conditions of employment. Petitioner's Exhibit W
17 consists of the BC's former job description used by the Respondent.
18 Exhibit W was admitted over objections that it was never negotiated
19 with the bargaining unit and never formally adopted by the City
20 Commission. The Petitioner's Exhibit X was admitted over hearsay
21 and relevancy objections, as the affiant, Linda Williams, was
22 present and testified concerning her own affidavit.

23 A thorough review of the transcript indicates that no formal
24 offer was made for the Petitioner's proposed Exhibit M. Exhibit M
25 was formally identified and timely exchanged on May 2, 1995, and
26 consists of a Fire Department (also referenced herein as "FD")
27 reprimand dated November 5, 1993. Counsel for the Respondent never
28 objected to this document. Counsel for the Respondent also asked

1 questions of a witness concerning Exhibit M. Due to what might
2 otherwise be considered a procedural oversight, this document is
3 admitted into the record.

4 Petitioner's Exhibits A-1 through F-1 were admitted without
5 objection. Exhibits G-1 and H-1 were admitted over relevancy
6 objections, as these two exhibits relate to the Petitioner's
7 contention of a "grievance problem." Petitioner's Exhibits I-1 and
8 J-1 were admitted without objection. Petitioner's Exhibit T was
9 admitted over a relevancy objection; this document concerns a new
10 position description for the Battalion Chiefs developed by former
11 Fire Chief Meisinger. The Petitioner's proposed Exhibit K-I was
12 admitted over relevancy objections and accorded due weight;
13 Exhibit K-I, the police lieutenant's job description, at least goes
14 to the contention of comparability of that position to the BCs'.

15 The Respondent's proposed Exhibits 1 through 4 were admitted
16 without objection. The Respondent's proposed Exhibit 5 was
17 admitted over relevancy and timeliness objections. Exhibit 5 is a
18 BC's pay stub and allegedly goes to whether the BCs are salaried or
19 hourly workers, and therefore is a relevant document. The parties
20 reserved the right to offer impeachment and rebuttal exhibits, and
21 Exhibit 5 is also admitted for these reasons. The Respondent's
22 Exhibits 6 through 9 were admitted without objection.

23 There were numerous objections from both counsel concerning
24 leading questions and speculation by witnesses. Much of the
25 testimony, particularly by the Petitioner's witnesses, involved
26 characterization of motivations of persons other than the
27 individual testifying and speculation by management personnel about
28 union motivation. Given the nature of the parties' strongly

1 divergent contentions about appropriate roles and interaction of
2 public sector workers and the overall good of the City. opinion
3 testimony was necessary, but is accorded due weight.

4 A certified transcript of the proceedings was prepared at the
5 request of the petitioner, joined in by the respondent. Upon
6 receipt of the post-hearing briefs on September 21, 1995, the case
7 was deemed submitted.

8 Given the level of highly divergent positions which came into
9 focus during this hearing, certain disclaimers by the Hearing
10 Officer are found to be in order. The undersigned has no known
11 close or distant family members or close friends who are or ever
12 have been members of a fire department (paid or volunteer), police
13 department, or who could be considered as closely associated with
14 management or union. For a few months in 1974, by virtue of part-
15 time produce department work for a large grocery store chain in the
16 metropolitan Washington, D.C. area, the undersigned was a nominal
17 member of a retail clerks' union.

18 **II. ISSUES TO BE DETERMINED**

19 Should the City of Great Falls Fire Department's Battalion
20 Chiefs be removed from their long-standing membership in the
21 recognized bargaining unit, the I.A.F.F., Local No. 8?

22 The Hearing Officer frames four main sub-issues which flow
23 from the above general issue:

24 1) Have the threshold requirements of ARM 24.26.630 for
25 filing a petition for Unit Clarification (UC) with the Board been
26 met? Conversely, has the Petitioner waived the right to challenge
27 the BCs' membership in the recognized bargaining unit by signing a

28

1 series of bargaining agreements and through the Petitioner's
2 failure to acquire express union permission to file this UC?

3 2) Is the position of Battalion Chief that of a "management
4 official" or "supervisory employee" according to Section 39-31-103
5 (7) and (11), MCA, and hence, by definition, not a "public
6 employee"? This sub-issue, and these two statutory exclusions,
7 raise the interplay and possible conflict with the "grandfathering"
8 statute of Section 39-31-109, MCA.

9 3) Do the Battalion Chiefs continue to meet the Board's
10 tests for inclusion in an "Appropriate Unit" as defined at ARM
11 24.26.611? {See, National Labor Relations Act, Section 9 (b) for
12 appropriate unit criteria}.

13 4) a. Does the Battalion Chiefs inclusion in the
14 collective bargaining unit create a "conflict of interest" (See
15 "policy" for public employee collective bargaining at Section 39-
16 31-101, MCA)? If any evidence of "strife" or "unrest" exists, can
17 its cause(s) be ascertained?

18 b. What impact, if any, may "strife" have on the BCs'
19 potential removal from the collective bargaining unit in light of
20 the Montana Supreme Court's strict guidelines for such removal
21 enunciated in City of Billings v. Billings Firefighters, Local 521
22 and Board of Personnel Appeals, 200 Mont. 421, 651 P.2d 627 (1982)?

23 At the earliest possible time the respondent raised alleged
24 federal and state constitutional issues of protected activities,
25 said to be violated by the petitioners' requests herein. The
26 Hearing Officer acting on behalf of the Board lacks subject matter
27 jurisdiction to adjudicate constitutional issues {Jarussi v. Board
28 of Trustees, 204. Mont. 131, 664 P.2d 316 (1983)}. Therefore.

1 these requested issues cannot be addressed, but are acknowledged
2 for any further appellate review.

3 Additional contentions raised by both parties are contained in
4 their jointly submitted PRE-HEARING ORDER (The Petitioner
5 enumerated 13 proposed issues of fact, and 3 issues of law; the
6 Respondent framed 15 issues of fact, and 12 issues of law). To the
7 extent that the numerous contentions are relevant to this Unit
8 Clarification and can be addressed in this forum, they will be
9 addressed as either factual disputes or as issues of law as framed
10 above.

11 Some of the proposed "issues of law," as framed by the
12 parties' counsel, are actually factual issues, or go beyond the
13 scope of this hearing and are not properly before the Board, or the
14 parties failed to submit credible evidence or arguments in support
15 of their proposed "issues of law."

16 The undersigned further notes that this case does not present
17 any issue of overtime pay pursuant to the Fair Labor Standards Act
18 of 1938 as amended (FLSA), 29 USC Section 201, et. seq. The
19 parties submitted no "tests," no state or federal statutes or
20 copies of any administrative rules in support of the Petitioner's
21 implied claim that the BCs meet the requirements for "executive,"
22 "professional," or "administrative" exemptions from the operation
23 of state or federal overtime laws. Whether the BCs are "salaried"
24 is examined herein, but is not ultimately determinative.

1 III. FINDINGS OF FACT ¹

2 1. The following four (4) "agreed facts" [numbered below as
3 2 through 5] are adopted verbatim as fact (Parties Joint Pre-
4 Hearing Order):

5 2. The bargaining unit represented by I.A.F.F., Local No. 8,
6 is described in Article 2, Subsection 2.1 of the Collective
7 Bargaining Agreement, entered into between the Petitioner and
8 Respondent with an effective date July 1, 1993 through June 30,
9 1995.

10 3. The collective bargaining relationship between Petitioner
11 and Respondent has existed since prior to July 1, 1973.

12 4. But since at least 1967 and continuing to the present
13 date, Battalion Chiefs have always been members of the collective
14 bargaining unit represented by Respondent Union.

15 5. That in the contract negotiations which resulted in the
16 extant collective bargaining agreement, the City proposed to have
17 the Battalion Chiefs excluded from the bargaining unit. The City,
18 thereafter, withdrew that proposal.

19 6. On June 16, 1994, the Petitioner through John Lawton
20 filed the Unit Clarification to exclude the BCs from I.A.F.F.,
21 Local No. 8. The respondent filed a MOTION TO DISMISS on August 5,
22
23

24 ¹All proposed findings, conclusions and supporting arguments
25 of the parties have been considered. To the extent that the
26 proposed findings and conclusions submitted by the parties, and
27 the arguments made by them, are in accordance with the findings,
28 conclusions and views stated herein, they have been accepted, and
to the extent they are inconsistent therewith, they have been
rejected. Certain proposed findings, conclusions and arguments
may have been omitted as not relevant or as not necessary to a
proper determination of the material issues presented. To the
extent that the testimony of various witnesses is not in accord
with the findings herein, it is not credited.

1 1994 (Administrative file; Petitioner's proposed
2 findings/procedural background).

3 7. No question concerning Respondent representation was
4 presented. No change of the recognized bargaining
5 representative/union has been contemplated at any time in question.
6 There was no allegation that the parties were engaged in contract
7 negotiations or that they were within 120 days of the expiration
8 date of the extant agreement {June 30, 1995} at the time of the
9 Petitioner's UC filing. There was no evidence that a petition for
10 clarification had been filed with the Board concerning the same
11 unit within the 12 months immediately preceding the UC filing {ARM
12 24.26.630(1)}. No procedural defect in names, descriptions,
13 addresses, number of copies to be filed with the Board, or any
14 other itemized requirement of ARM 24.26.630(2) was alleged
15 deficient by the Respondent (Administrative file; parties' pre-
16 hearing briefs).

17 8. Following briefing, the undersigned denied the
18 Respondent's MOTION TO DISMISS by an ORDER on November 18, 1994.
19 After briefing the Respondent's MOTION FOR SUMMARY JUDGMENT was
20 denied by ORDER dated January 18, 1995 (Administrative file).

21 9. The underlying reasons the Petitioner seeks to remove the
22 BC's from their long-standing membership in the recognized
23 bargaining unit can, at least in part, be gleaned from a fair,
24 representative, and necessarily lengthy sampling of Mr. Lawton's
25 own words to the Mayor and City Commission regarding the Battalion
26 Chiefs and costs to the City in undated Exhibit A and Exhibit B
27 (November 2, 1993) :

28 One is that they {the union} must allow the
contract to be changed to allow longer work

1 periods... This is unconscionable given the
2 pressure on municipal government to improve
3 productivity and to make better use of tax
4 dollars. (Exhibit A, p. 1; emphasis added)

5 ...Right now, they {the BC's} are viewed as
6 shift commanders and are working the same
7 shifts as the rank and file troops. We need
8 them as managers and, in fact, their job is
9 management even though they are in the union.
10 (Exhibit A, p. 1; emphasis added)

11 The reality of the situation is that we can
12 not meet the work that MUST be done for the
13 fire department to survive in the long run.
14 The majority of the problem rests with the
15 unproductive work schedule they have with
16 unconscionable work periods. (Exhibit A, p.
17 1)

18 ... With the concept of having to do more with
19 less, the Battalion Chief positions stand out
20 like a sore thumb... They are the last of a
21 dying breed. (Exhibit A, p. 2; emphasis
22 added).

23 We told them one of the options we are
24 considering is to create up to 3 assistant
25 chief level positions that would be
26 responsible for and be held accountable for
27 the three critical areas that the BC's have
28 been ineffective at for numerous reasons.
29 Because we are locked in by a contract with
30 grotesque work rules, we would allow the BC's
31 to exist on the public payroll until they
32 retire... The Union has filed an Unfair Labor
33 Practice charge with the State Board of
34 Personnel Appeals on the BC issues. We have
35 prepared a vigorous defense and, with your
36 approval, expect to carry this all the way to
37 the Supreme Court if necessary...
38 (Petitioner's Exhibit A, 1 and 2; emphasis
39 added)

40 And I would just digress a minute to say that
41 I think our discussions have been respectful
42 and they have been {sic} or disagreements have
43 been on agreement to disagree basis. I don't
44 think we have had the kind of animosity that
45 we often get with disputes between labor and
46 management... (Exh. B, 3; emphasis added)

47 ...We have a good Fire Department, we have a
48 good record of how we deal with fires, and a
49 lot of {sic} there is some truth in what they
50 say but I say that only in the traditional

1 sense... Also, by the standards of the 1993
2 taxpayer demands for holding the line on taxes
3 and improving customer service, the
4 traditional system {sic} always the
5 traditional system just doesn't cut it. It's
6 time to change. The system is wrong. It's
7 broken and it's going to change whether the
8 firefighters sit down and agree or not.
9 (Exhibit B, p. 4)

10 ...I have great respect for them and I have
11 great respect for what they do, but it's
12 already becoming a cliché like reinventing
13 government about good people caught in a bad
14 system. And that's just the way I look at
15 the firefighters. They're not only good
16 people, they are excellent people, but they're
17 caught in a very bad system. (Exh. B, 4;
18 emphasis added)

19 Thereagain, battalion chiefs real function is
20 to supervise the fire ground at a structure
21 fire, I mean that's the guts of what he does.
22 (Exh. B, 8; emphasis added; also see TR at 8)

23 ...We have had no success in changing that
24 into anything that gets anything that I
25 recognize as productivity. (Exh. B, 10;
26 emphasis added)

27 10. In Fiscal Year (FY) 1996, the City had 438 employees.
28 There were approximately 65 employees in the Fire Department.
29 Mr. Lawton is appointed by the City Commissioners and answers to
30 the elected Commissioners. Mr. Lawton is responsible for all
31 hiring and firing of City personnel and supervision of all City
32 services. Mr. Lawton appoints the Fire Chief, then the Fire Chief
33 appoints the Fire Marshall and the Deputy Fire Chief (until
34 recently the Deputy Chief has been classified as the Assistant Fire
35 Chief; TR at 91; testimony of J. Lawton, TR at 4 - 6).

36 The Chief and the Deputy Chief supervise all others. The Fire
37 Marshall, somewhat in a side box, does not supervise the Deputy
38 Chief. The Battalion Chiefs supervise the Captains. The Captains

1 supervise the Engineers. The Engineers, however, do not supervise
2 the Fire Fighters or probationary Fire Fighters (TR at 28, 29).

3 11. During the contract negotiations that took place over the
4 contract which ended June 30, 1995, the City sought to negotiate
5 the BC's out of the bargaining unit (TR at 143 - 146). The record
6 is replete that among the City's proposals were the transfer of the
7 BC's duties to newly to-be-created Assistant Fire Chiefs, who were
8 to be appointed as the incumbent BC's retired (TR at 5, 6). A ULP
9 was filed, the City answered, and a STIPULATION FOR DISMISSAL WITH
10 PREJUDICE was signed by the parties January 18, 1994 (Exhibits C -
11 E). This Stipulation contained no reservation by the City to file
12 the current and intricately related Unit Clarification petition.

13 12. John Lawton became City Manager April 16, 1990. His
14 preceding jobs were Assistant City Manager in Billings, Montana and
15 the Billings' Director of Finance and Administrative Services (TR
16 at 4, 26). In his 11 years in Montana, John Lawton has held
17 responsibility for labor relations. As long as 20 years ago, Mr.
18 Lawton believed that Fire Department Battalion Chiefs did not
19 belong in a union: "...it's been my opinion that battalion chiefs
20 should be excluded from the union... It would be by any manager.
21 Ask any city manager." (TR at 29, 30; emphasis added). Mr. Lawton
22 added that the opinion to exclude BC's from the union "...may have
23 been others as well." (TR at 30)

24 13. Mr. Lawton's attitude toward the BCs' and the importance
25 the City Manager attaches to the BCs' functions and
26 responsibilities is reflected throughout his testimony, including
27 unattributed hearsay:

28 The battalion chiefs to this day are ridiculed
... [T]hey're ridiculed among the rank and

1 file employees... So we felt that to increase
2 productivity and to get the management tasks
3 done that we needed to have done, we needed to
4 have full value from the battalion chiefs, so
5 we proposed both extraction from the union or
6 severance from the union...

7 ...we proposed was to leave the current
8 battalion chiefs in place with their titles
9 and positions until they retire, because they
10 would, in effect - just leaving them there
11 would be harmless since they don't do very
12 much anyway. And we had proposed to bring in
13 two or three additional assistant chiefs to
14 fulfill the management functions that were not
15 being taken up by the battalion chiefs because
16 of the resistance of the union to any change.
17 ...and then abolish those positions when they
18 did retire... (TR at 10; emphasis added)

19 I prepared the offer and then I prepared a
20 history of the negotiations and of the
21 reasoning behind our proposal, with emphasis
22 on the management functions that the chief
23 [Meisinger] had asked the battalion chiefs to
24 perform but were unable to because of their
25 union membership. (TR at 12; emphasis added)

26 We want them to do more things that aren't
27 being done right now. Most departments this
28 size would have a training officer, for
29 example. (TR at 16; emphasis added)

30 Q: And that overtime pay requirement is
31 pursuant to what requirement? The time in
32 excess of their normal shift responsibilities.

33 A: If they were not union members, we could
34 schedule them... where they all need to be
35 together without the incurrence of overtime.
36 (TR at 18; emphasis added)

37 Absolutely because management would then
38 control the shifts and the shifts
39 scheduling... We could do it at a lower cost
40 because it wouldn't require overtime. (TR at
41 19, 20; emphasis added)

42 Q: you state under Item 2 that long before,
43 long before entering into negotiations,
44 exclusion of battalion chiefs from the unit
45 was deemed necessary to create a management
46 team for the fire chief, to enable proper
47 management of the fire department, inclusive
48 of but not limited to the additional duties of
training, equipment, facilities maintenance,

1 and hazardous material training and planning.
2 (TR at 23; emphasis added)

3 A: Because we are going to have to change the
4 way we do business in order to give the
5 taxpayers the best bang for the buck. We're
6 not going to be able to do that over night and
7 I view these collective bargaining issues as
8 steps in a long process to eliminate alarm
9 time, over time, and to make all work time
10 productive time... (TR at 48; emphasis added)

11 14. The Fire Department Captains are regarded as part of
12 management, to a degree. They are considered by John Lawton as the
13 first line supervisors, but are not part of this petition.
14 Captains plan and direct their crews and company. Captains are
15 likened to lead workers. They may issue oral and written
16 reprimands (TR at 29, 32, 45 and 92).

17 15. There have been very few new hires in the Fire Department
18 since John Lawton came to his position in April, 1990.
19 Approximately eight laid off workers were eligible for recall
20 pursuant to contracts negotiated with the Respondent and after John
21 Lawton's approval. Two or three of these eight firefighters did
22 not return to the FD. Since Ron Meyers came on board in 1984,
23 there have been 15 or 16 new hires, in addition to the five or six
24 above.

25 BCs' did not sit on interview panels until a month or so
26 before the hearing. The Petitioner submitted no documentary
27 evidence to contradict Mr. Meyer's knowledgeable figures (TR at
28 315). Within a month or so immediately preceding the instant
hearing, as the Petitioner's witnesses were uncertain about dates,
two new Fire Department workers have been hired. Joe Russel was
hired the week of the hearing, and Chad Cortman was hired a little
earlier (Testimony of L. Williams, TR at 207).

1 A BC was ordered to sit on at least one of those oral
2 interview/hiring panels, and by the Petitioner's history, BC Ron
3 Bidwell may have been directed to sit on possibly one other panel.
4 The BC's vote carried no particular weight. John Lawton initially
5 testified that the only limited Fire Department transfers were
6 among stations, and later testified that he lacked knowledge of any
7 transfers by BC's (cf. TR at 7 and 32, 33).

8 16. The only credible testimony on how performance
9 appraisals are treated by Fire Department management came from
10 Howard Clos. Mr. Clos' credible and accepted testimony (herein)
11 contradicted John Lawton's testimony, that BCs' evaluations should
12 be used in promotion of Department personnel (TR at 7, 8).
13 Management places little value on the BCs' evaluations.

14 17. John Lawton claimed that "numerous grievances" had been
15 filed, but referenced only two. Upon cross-examination John Lawton
16 admitted that when differences between management and workers
17 arose, they had been settled according to the contract procedures.
18 John Lawton admitted that in his experience, Captain Oswald's
19 grievance had gone further (District Court) than any other
20 municipal worker's. It was uncontroverted that many potential
21 labor problems are addressed first by the [union] Executive Council
22 [the "E" Board], and never come to the City's attention. No
23 baseline for a "reasonable number" of complaints was attempted by
24 the parties.²

26 ²Summaries of grievances are included within these findings.
27 The Hearing Officer is mindful that this is a UC case and not a
28 ULP. Both parties introduced much evidence regarding whether the
grievances support the removal of the BCs from the unit, or
whether the grievances reveal something else. How the grievances
came about is found to be relevant to the BCs' work duties.

1 18. Mr. Lawton believes in a "consultative" process, and
2 indicated that "judgment and common sense" would dictate
3 consultation all the way up the line to him on any "serious
4 disciplinary matter." By statute the BCs lack the disciplinary
5 authority the Petitioner has recently presumed to grant them or
6 claimed they already have. BC's lack unfettered authority to
7 resolve grievances or to impose discipline. By statute, only the
8 mayor, city manager, Fire Chief or his Assistant Chief may suspend
9 other firefighters, within a formal process (Sections 7-33-4123,
10 and 7-33-4124, MCA).

11 The experience of the incumbent Fire Chief, Jim Hirose, is
12 instructive here. Mr. Hirose, while a BC himself, attempted to
13 discipline a fellow firefighter for dress code violation. The then
14 BC Hirose's suspension of a fellow firefighter for a day was
15 immediately countermanded by the Assistant Chief. (TR at 8 and 31).

16 19. The mere use of military titles within the Fire
17 Department ranking does not prove the Petitioner's contention that
18 the Fire Department "is a paramilitary organization." (TR at 25)
19 Fire Department staffers were not shown to carry weapons, or to be
20 authorized to use deadly force, make arrests, or quell civil
21 disturbance.

22 Administrative notice is taken, that fraternal and service
23 organizations such as the International Order of Foresters, the
24 Salvation Army, and more recently, groups of Montanans engaged in
25 civil rebellion, use "military" titles. Comparability to the
26 Police Department has not been thereby established or linked,
27 except by managerial fiat. Moreover, the essence of the
28 "paramilitary" argument was emphatically rejected by the Montana

1 Supreme Court in McKamey v. State, 268 Mont. 137, 885 P.2d 515
2 (1994).

3 20. Police Lieutenants are now exempt or considered
4 management. They are regarded by Police Chief Jones as shift
5 commanders. Their non-union status unquestionably saves the
6 Petitioner money and provides "flexibility" in scheduling manpower.
7 Chief Jones never read the BC's position description before
8 testifying on the alleged similarity to his own lieutenants
9 (Testimony of R. Jones).

10 21. The City Commission paid for a survey of the public's
11 attitude toward the Fire Department among Great Falls' citizens.
12 A highly favorable rating was disclosed by the survey (TR at 42).

13 22. In keeping with state law, Fire Department members have
14 never gone on strike or refused to cross a picket line according to
15 uniform testimony of both parties' witnesses (TR at 42).

16 23. There have been no BC's on the Respondent's labor
17 negotiation team (Testimony of J. Lawton and R Meyer). The
18 Petitioner's "bargaining team" for the previous contract
19 negotiations included Chief Meisinger, Deputy Chief Hirose, Linda
20 Williams, Jerry Sepich (the Director of Parks and Recreation), who
21 conferred with John Lawton. The Petitioner had the benefit of
22 legal counsel (TR at 90).

23 24. John Lawton hired Richard Meisinger as Fire Chief,
24 effective November 23, 1992. (TR at 49) Mr. Meisinger had no
25 experience as a Fire Department officer within an organized labor
26 union, or any experience with collective bargaining. His extensive
27 fire department background was in Colorado and Kansas. His former
28 employer refused to recognize a local fire department union (TR at

1 84). Richard Meisinger came to Montana with the idea that
2 Battalion Chiefs should be excluded from organized bargaining
3 units.

4 25. In examining the evidence as a whole, The Petitioner
5 failed to show that it currently lacks full authority to schedule
6 and control Fire Department personnel as the Petitioner sees fit.

7 26. Mr. Meisinger was paid \$1,200.00 in addition to all
8 travel expenses for his testimony (TR at 86).

9 27. At the time of hearing, there were four BC's in the
10 collective bargaining unit. Those BC's, with combined experience
11 exceeding 100 years, were Gary Stewart, George Sisko, Dean Mora and
12 Ron Bidwell (Respondent's proposed finding no. 13).

13 28. A Petition was signed in the spring of 1995, by forty-
14 seven firefighters, requesting that the BC's remain in the unit.
15 The Petition asserted that the BC's union membership had caused no
16 strife within the unit. Wayne Young, now Deputy Chief, was one of
17 those signers. All four BC's signed. It was uncontroverted that
18 only one firefighter refused to sign. The difference between 47
19 signers and a total complement of 60 members in the local, reflects
20 that the Petition circulator, Ron Meyers, was unable to personally
21 contact all Fire Department members over a couple of days due to
22 work scheduling, vacation and sickness (TR at 326).

23 29. The Petitioner's attitudes toward the BC's, is at least
24 partly reflected in Mr. Meisinger's own words:

25 [The idea of excluding BC's from the unit also came from
26 Mr. Meisinger] My very first staff meeting in December
27 of 1992... I was not happy that I had to pay the
28 battalion chiefs time and a half... (TR at 52)

1 They should not be union members... battalion chiefs
2 within this department represent the union... Management
should run the fire department...

3 [In reference to the BC's] I would say that we had to
4 force feed them on certain issues... Their concerns were
to protect and look out for the labor side of issues...

5 ...I can tell you that it put me in a position where my
6 management team was basically cut in half, because of, I
7 would say, the undermining that was done by the three
8 battalion chiefs when controversial or issues that maybe
9 they did not agree with, because they would take them out
and share them with other personnel in the organization,
and therefore, we started excluding them [the BC's] from
our conversations and some of the decision making process
that they should have been involved with. (TR at 56;
emphasis added)

10 ...the battalion chiefs are going to take care of their
11 own, and that means they're going to look out for the
12 union... (TR at 58; emphasis added)

13 [In answer to whether the BC's were involved in the
14 planning and directing work] Initially, they weren't
15 involved in a lot of things, but as I identified some
needs... first we asked them to volunteer... and only one
of the three volunteered, so we assigned... (TR at 59;
emphasis added)

16 Because of this grievance being filed. It just seemed
17 like every time that the local saw a chance to prove a
18 point, they would jump on it, at least during my tenure.
19 And the contract was an issue that they constantly were
there to remind me, and that's fine, but - so we made
sure it was in the new one, that we had the ability to
take care of the organizational needs. (TR at 67;
emphasis added)

20 These things occur and this community doesn't want to pay
21 to have 200 fire fighters so we'll have to do what we can
22 with our resources... Their allegiance lies with the
23 union, doesn't lie with the city or the citizens like a
24 chief officer should have their allegiance lying with the
Department and the policies within the organization. (TR
at 71; emphasis added)

25 [Mr. Meisinger read from his own deposition.] I let my
26 battalion chiefs know right up front that I did not want
27 them in a bargaining unit because I felt management was
28 compromised by them being part of the bargaining unit.
(TR at 87; emphasis added)

Q: You rewrote job descriptions for battalion chiefs, correct?

1 A: I, what you need to realize is I had input but not any more
2 than battalion chiefs did on their job descriptions...
3 Attempted to give them more responsibility that went already
with the authority that was already in place by their old job
descriptions. (TR at 89)

4 Q: So you attempted to give them more responsibility?

5 A: Yes sir. (TR at 90)

6 Q: Now battalion chiefs, they get paid overtime compensation,
do they not?

7 A: Yes, they do. [pursuant to the collective bargaining
8 agreement] (TR at 92)

9 Q: Do the, the fire chief, the fire marshall, and the
10 assistant fire chief, do they get paid overtime compensation?

11 A: No sir. They don't get anything, they're salaried. (TR
at 92)

12 Q: Doesn't information flow both ways?

13 A: Supposed to.

14 Q: Okay. But you didn't want it flowing from you down to the
unit through the battalion chiefs.

15 A: That's true. On some issues I did not. (TR at 107;
16 emphasis added)

17 [In regard to the additional duties the BC hazardous
18 materials, training and maintenance officers were assigned]

19 Q: Were those additional duties ever negotiated with the
union?

20 A: No.

21 Q: Did, during contract negotiations, the item of bargaining
22 saying, "We propose to pay the various officers straight time
for this additional training," did that ever come up?

23 A: No. (TR at 108; emphasis added)

24 [In answer to whether the firefighters and the BCs gave any
25 recommendation on the purchase of a "quint," - a large,
pumper/ladder truck]

26 No, I made that decision as fire chief to buy - to
27 purchase a quint in the future. (TR at 109; emphasis
added)

28 I formulated my decision on and then handed that decision
down to a - we put together an apparatus committee

1 consisting of captains and engineers to develop the
2 specifications for that piece of apparatus after we
3 decided here's what we're going to purchase. I had
4 decided that after listening to input. (TR at 111)

5 If we tried to negotiate every little additional duty or
6 training that we wanted to send a chief officer [Mr.
7 Meisinger's alternate term for a BC] to, now, you want to
8 talk about hamstringing an organization, so that's why I
9 pursued and tried to negotiate them out, because there
10 are numerous issues that management is involved with.
11 Therefore, you know, to bring one issue as a specific
12 issue at the bargaining table would - it's almost
13 ridiculous. (TR at 111 and 112; emphasis added)

14 I wanted the battalion chiefs to do their job, and I
15 wanted them to be salaried to do that job. (TR at 113)

16 30. Then Chief Mesinger demanded explanations from four
17 Captains who failed to attend a meeting. Three Captains gave
18 written reasons. Mr. Meisinger directed the Captains' BCs to
19 furnish him the explanatory letters. Captain Oswald's written
20 explanation so displeased Mr. Meisinger that the Chief suspended
21 Oswald without pay for 48 hours and placed him on probation for one
22 year. Mr. Meisinger was also upset with the BC, and believed that
23 the BC should not have conveyed Oswald's explanation, and that the
24 BC should somehow have anticipated that [the letter] "It's going to
25 make him mad." Mr. Oswald's grievance is pending according to Mr.
26 Lawton (TR at 73 and 100 and Exhibit H-1)

27 31. When management was busy, overlooked, and thereby failed
28 to perform a certain contractual obligation [establish and post
29 tests for potential BC promotions every other year], Chief
30 Meisinger expected understanding from the union, rather than a
31 grievance (Exhibit I-1; and Article 20.2 of the CBA). Due to on-
32 the-job injuries and off-the-job occurrences, management allowed
33 Department staffing to fall below contractual minimums in part to

1 conserve overtime pay (TR at 74). Based in part on safety for the
2 City concerns, the union filed a grievance (Exhibit J-1).

3 32. A previous contract allowed at least two FD members
4 vacation days off for a given shift throughout the year (Exhibit A-
5 1). When management memos of January 25 and August 19, 1993,
6 ordered that vacation leave could not be taken during fire
7 prevention week, a grievance ensued based on contract violations
8 (Exhibit B-1). This was later resolved informally, as the vacation
9 was canceled (the fire fighter got his deer hunting) and other fire
10 fighters offered to cover for the fire fighter in question (TR at
11 103). The Petitioner introduced contract language to obviate such
12 misunderstandings, and the contract process worked.

13 33. Chief Meisinger forbade union meetings at fire halls, in
14 contrast to all past practice and despite paying lip service at the
15 hearing of their right to meet. He instituted his new policy
16 during contract negotiations. Mr. Meisinger admitted his actions
17 could be seen as "antagonistic." (TR at 105).

18 Following a grievance, the Chief adopted a new policy and
19 rescinded his order forbidding union meetings. The Chief's earlier
20 reason, that multiple fire trucks were inappropriately used, was
21 clearly contradicted by Charles Rovreit and the union roll book.
22 Mesinger's purported reason proved false and is again
23 representative of his animus toward his organized workers (TR at
24 294).

25 34. BC Mora was directed by the Chief to contact the Billings
26 Fire Department to obtain a copy of their established training or
27 proficiency standards, and "quint" specifications (TR at 75, 76).
28 Chief Meisinger pointed Mora in that direction because, in Mr.

1 Meisinger's words "...why reinvent the wheel?" BC Mora obtained
2 specifications from the Billings Fire Department. Mora's efforts
3 were criticized and those new duties re-assigned to BC Bidwell.

4 35. The City and Chief Meisinger re-wrote the position
5 description for Battalion Chief. The BCs' themselves were granted
6 some opportunity for input. Chief Meisinger's new job offering
7 (Exhibit T) emphasizes that applicants need be aware the job may
8 become exempt or non-union.

9 36. Chief Meisinger, despite a contrary recommendation of the
10 majority of the staff, decided to purchase a "quint,". There was
11 no credible evidence that BCs' influence the selection or
12 acquisition of other tools and equipment. The assertions of
13 Messrs. Meisinger and Lawton as to the power of the BCs' is
14 rejected as less reliable than the credible testimony of Talbert
15 Bryan, Howard Clos, Charles Rovreit, Dean Mora and Ron Meyers.

16 37. Chief Meisinger refused to allow a BC to grant vacation
17 days off. Chief Meisinger denied Ron Meyer's request in August
18 1994. The reason cited was budget shortage; the other reason cited
19 by Chief Meisinger pertaining to another firefighter being off was
20 not accurate (TR at 310; Exhibit 8)

21 38. George Sisco's attempt as a BC to exercise limited shift
22 transfer of an engineer was countermanded and punished by Chief
23 Meisinger (Exhibit 3). BCs' cannot "transfer" firefighters, but
24 have limited authority to "trade" workers to cover a shift, but
25 only subject to higher managerial authority. BCs' may assign
26 members of their platoon to any station or piece of equipment
27 deemed appropriate. Even transfers such as these may be discussed
28

1 with the Chief or Deputy Chief, according to James Hirose (TR at
2 118).

3 BC Sisco sought to keep the engineer to keep off his
4 shift/platoon because the engineer had verbally denigrated co-
5 workers. Howard Clos' credible testimony on this version of events
6 was uncontroverted. BC Sisco's men complained about the individual
7 causing the actual conflicts (TR at 284). Chief Meisinger punished
8 and suspended BC Sisco for exercising his limited authority and for
9 BC Sisco's seeking to prevent a disruptive person being traded into
10 his platoon. Chief Meisinger's action, in essence, undermined the
11 authority the Petitioner bestowed upon the BCs:

12 Article 4 of the City's Rules and Regulations as it relates to
13 BCs, states (Respondent's proposed finding no. 21):

14 They shall under direction of the assistant fire
15 chief and/or fire marshall have full command,
16 control and responsibility of a platoon and shall
17 be responsible for the condition, discipline,
18 efficiency, detailing of subordinate members and
19 notifying their supervisors of such actions.

20 39. Battalion Chiefs are paid overtime at time-and-a-half.
21 They may be docked pay for leave when sick pay or vacation is not
22 taken. BCs' are scheduled far in advance and usually work
23 predictable schedules.

24 The City labels the BCs "salaried" for the Petitioner's
25 administrative and contract purposes, as the BCs' hours do not
26 regularly fluctuate as much as part-time City employees. The
27 Petitioner calls workers "salaried," as opposed to hourly, if their
28 regular schedule is 72 hours, bi-weekly, or 96, as reported for
29 firefighters (TR at 220).

1 There was no formal presentation of evidence that the BCs met
2 all elements of "salaried exempt" tests as professional,
3 executive, or administrative employees (ARM 24.16.204). {Certain
4 federal court cases are examined in the CONCLUSIONS OF LAW section
5 as they impact this case.} (TR at 77 and 92).

6 40. BC Dean Mora's pay stub for the pay date of April 20,
7 1995, indicates a per hour rate of \$18.03. For this pay period, he
8 earned four hours of overtime at time and a half (Exhibit 5).

9 Credible and uncontradicted testimony of Engineer Ron Meyer's
10 explained firefighter's general pay scheme. Through collective
11 bargaining, firefighters now work a forty-two hour typical week.
12 However, they have agreed to be paid at straight time for up to 53
13 hours a week, or 212 hours in a twenty-eight day period. They
14 agreed to the 10 and fourteen shift sought by Lawton. Policemen
15 must be paid time and a half for all work over forty hours. To
16 that extent, the Petitioner already receives more straight time
17 from the Respondent without having to pay overtime (TR at 312,
18 313).

19 41. The Petitioner's new Battalion Chief job description is
20 more illustrative of the BCs' actual authority, than the testimony
21 by management personnel at the hearing would suggest (Exhibit V):
22 "with the concurrence of upper levels of management and within
23 prescribed procedures [BCs] may recommend hiring...." (emphasis
24 added). The permissive use of "may," the repeated testimonial
25 examples of management overriding BCs' attempted exercise of
26 limited discretionary authority, and the management-dictated
27 strictures denote the limited authority BCs actually enjoy.

1 42. No Great Falls' BC has ever hired, fired or promoted
2 another fire fighter (TR at 32 and 92). There was no evidence that
3 the BCs' recommendations/appraisals have been taken very seriously,
4 although they prepare written confirmations for promotions.
5 Howard Clos' review of his twenty-five year personnel file
6 contained but three evaluations. There was no contention by the
7 Petitioner that Captain Clos' file was out of the ordinary (TR at
8 283). BCs' have never had any influence on setting their
9 department's budget (TR at 95). No BC has ever suspended another
10 fire fighter without pay, and the only reported brief suspensions
11 of firefighters by BCs have been immediately countermanded by
12 management (TR at 309).

13 43. The BCs' perform some supervisory functions, and have
14 significant duties for fire scene management. BCs must implement,
15 but have had no authority or participation in setting management
16 policies. From the overall testimony presented, especially that of
17 James Hirose, Captains do more day-to-day routine work planning
18 than BCs. For example, BCs oversee that work scheduled by Captains
19 is done (TR at 119 and 125).

20 44. James Hirose was hired in the Great Falls Fire Department
21 in 1967, and rose through the ranks. Mr. Hirose became a Battalion
22 Chief in 1985, was appointed Assistant or Deputy Chief in 1990,
23 Acting Chief in September 1994, and made Chief in February 1995 (TR
24 at 115; Petitioner's proposed findings). Based on his testimony
25 and demeanor, Chief Hirose conveyed truthfulness and a sense of
26 responsibility for his department and the public (TR at 114 to
27 175).

1 45. BCs' perform planning activities within management-
2 established "standards." Planned or needed training activities may
3 be developed within approved standards by a BC, and then "run it by
4 the deputy chief or [the Chief]." (TR at 121)

5 The BCs' exercise of "independent judgment" is constrained by
6 "specific duties" adopted by the Petitioner, according to Chief
7 Hirose (TR at 125): "They're not - they pretty much are assigned
8 these responsibilities and given - working under the guidelines
9 that are here. They develop their programs from them." (TR at
10 125; emphasis added)

11 46. The Petitioner's minutes of meetings attended by BCs'
12 were prepared by a Petitioner's administrative assistant. There
13 was no showing that any BC ever voted or approved any "minutes" of
14 any meetings in question (TR at 121 to 124).

15 47. New duties assigned by then Chief Meisinger (hazardous
16 materials, training, planning and facilities) had not been part of
17 the BCs' duties in the past. As a BC, James Hirose had no
18 participation in any budgetary process (TR at 126).

19 48. Chief Hirose claimed that the BCs' did not always
20 institute some of their admittedly limited disciplinary authority
21 when warranted. Significant matters require consultation with
22 upper management, as John Lawton earlier urged. Earlier examples
23 (in this decision), also establish that a BC's actions, including
24 then BC Hirose's, might be countermanded by higher management.
25 However, rather than apparently offend colleagues on occasion, BCs
26 brought some smaller, proposed disciplinary matters to the
27 Assistant Chief or Chief (TR at 134).

1 Chief Hirose is found to be generally credible. However, his
2 example of BC Mora being reluctant to take action against Captain
3 Young {failure to maintain radio contact}, if demonstrative, is a
4 weak example of the BCs' alleged reluctance to exercise discipline.
5 Wayne Young was promoted over others, and is now the Deputy Chief.

6 49. Wayne Young's position that the BCs' should be retained
7 in the bargaining unit has changed since his promotion. His
8 credibility was placed in issue. No other known firefighter has
9 been promoted to Deputy or Assistant Chief without first attaining
10 the rank of BC. By his own admission, the Deputy Chief has been
11 referred to, presumably critical terms by some, as a "brown noser,"
12 "kissing up," or "bucking for promotion." However, Wayne Young is
13 also found to be willing to work hard, "give an honest day's work,"
14 and displayed concern for the good of the department.

15 Wayne Young, before becoming Deputy Chief, disagreed with
16 disciplinary action taken against BC Mora, who was ill on
17 medication and missed a call. Fellow firefighters typically make
18 sure their BC is awake before proceeding to a fire scene, based on
19 issues of safety and courtesy. BC Mora's membership in the unit
20 has not caused strife (TR 304, 305). While Deputy Chief Young may
21 have become aware of other perspectives since assuming his new
22 management position, his contemporaneous and negative reaction to
23 disciplinary action taken against BC Mora, is found to be a more
24 genuine response (TR 240 - 250).

25 50. Mr. Meisinger instituted the wearing of collar brass for
26 FD officers. While visiting a fire hall, Mr. Meisinger observed
27 Engineer Talbert Bryan wearing a union pin on his firefighter's
28 uniform. This angered Chief Meisinger. Mr. Meisinger's testimony

1 that he did not recognize it as a union pin is rejected as
2 incredible.

3 Rather than directly ordering Mr. Talbert to remove the pin,
4 or discussing the matter, or working out a policy for the wearing
5 of American flags, union pins, collar brass, and any other
6 permissible items, Meisinger ordered action by BC Sisco against
7 Talbert. Meisinger could have defused the situation on the spot.
8 However, Meisinger was angry that the BC failed to read his mind
9 and take whatever disciplinary action Meisinger was apparently
10 contemplating. Meisinger was angry that a grievance was filed.
11 However, the matter resolved in an orderly manner as contemplated
12 in the contract. The Chief later developed and enunciated a policy
13 for wearing pins (Exhibit 7).

14 51. The BCs have demonstrated a community of interests with
15 other unit members. The BCs share similar wages, hours, fringe
16 benefits and working conditions. They share similar skills and
17 interests. Chief Hirose acknowledges this in his testimony (TR at
18 140). By jointly stipulated Finding Nos. 3 and 4, the BCs and
19 other firefighters prove a long history of collective bargaining.

20 There was no question that common personnel policies are
21 shared among the members of Local # Eight. Testimony uniformly
22 supports an integration of work functions, and direct, daily
23 interchange among the affected employees. The wishes of the
24 affected workers strongly support the retention of the BCs in the
25 recognized bargaining unit (Finding No. 28).

26 52. BCs do somewhat less menial cleaning chores than lower
27 ranking firefighters, however. The Petitioner would undoubtedly
28 save money if the BCs were removed from the unit.

1 53. Section 1.2 of the collective bargaining agreement most
2 recently in effect provides (Exhibit 1):

3 It is the purpose of this agreement to achieve
4 and maintain harmonious relations between the
5 City and the Union, and to establish proper
standards of wages, hours and other conditions
of employment.

6 Article 2, the Recognition Clause of Section 2.1 provides:

7 The City recognizes the Union as the exclusive
8 collective bargaining agent for all uniform
9 members, excluding the chief, assistant chief and
fire marshall, and all initial probationary
employees of the Great Falls Fire Department.

10 54. The overwhelming weight of the evidence supports a
11 finding that to the extent "strife" has occurred, it has not been
12 caused by the BCs membership in the union (Finding No. 28). All
13 non-management personnel credibly denied that the BCs' membership
14 in the union had caused problems.

15 The grievances cited by the parties merely establish that
16 differences can be resolved within the existing framework of the
17 grievance procedure. In the four year's prior to Chief Meisinger's
18 tenure, about one grievance a year was filed. During Mr.
19 Meisinger's term as Chief, Ron Meyers estimated between 15 to 20
20 grievances were filed. No reported grievances have been filed
21 since Meisinger's departure. The Petitioner submitted no evidence
22 whatsoever to dispute the Respondent's figures (TR at 322, 323).

23 55. Linda Williams has been in charge of City Personnel since
24 1981. She participates in contract negotiations, among many other
25 duties. Linda Williams did not sit on any recent firefighter
26 hiring panels, but one of her subordinates did. Firefighters,
27 including BCs' did not participate in creating or grading the tests
28 used for new hires. Linda Williams rarely visited fire halls,

1 except for insurance paper work, or the like. What negative
2 comments Ms. Williams heard about the union came from management
3 personnel (TR at 175 to 225).

4 56. Linda Williams was present and took notes at an August
5 10, 1993, negotiation session with the Respondent's
6 representatives. Exhibit X contains Ms. William's account of
7 remarks made by John Lawton during that bargaining session
8 regarding removing BCs' from the bargaining unit (Mr. Lawton did
9 not deny the remarks during his own testimony): "When we go to
10 unit determination we're not going to be too kind."

11 IV. CONCLUSIONS OF LAW

12 1. The Department has jurisdiction in this matter pursuant
13 to Sections 39-31-104, and 39-31-105, MCA.

14 2. A. The Petitioner meets the filing requirements of ARM
15 24.26.630 for this Unit Clarification Petition. The Board's rules
16 were adopted pursuant to Sections 39-31-202, and 39-31-207, MCA.
17 The conclusion that this Petition is in order ratifies the same
18 preliminary rulings prior to the hearing, and is based on Finding
19 Nos. 7 and 8. The elements of 24.26.630 are set out below:

20 24.26.630. PETITION FOR UNIT CLARIFICATION OF BARGAINING
21 UNIT (1) A petition for clarification of bargaining
22 unit may be filed with the board by an exclusive
23 representative of the bargaining unit in question or by
24 the public employer only if:
25 (a) there is no question concerning representation;
26 (b) the parties to the agreement are neither engaged in
27 negotiations nor within 120 days of the expiration date
28 of the agreement, unless there is mutual agreement by the
parties to permit the petition;
(c) a petition for clarification has not been filed with
the board concerning substantially the same unit within
the past 12 months immediately preceding the filing of
the petition; and
(d) no election has been held in substantially the same
unit within the past 12 months immediately preceding the
filing of the petition.

1 (2) A copy of the petition shall be served by the board
2 upon the bargaining representative if filed by a public
3 employer and upon the employer if filed by a bargaining
4 representative.

5 (3) A petition for clarification of an existing
6 bargaining unit shall contain the following:

7 (a) the name and address of the bargaining
8 representative involved;

9 (b) the name and address of the public employer involved;

10 (c) the identification and description of the existing
11 bargaining unit;

12 (d) a description of the proposed clarification of the unit;

13 (e) the job classification(s) of employees as to whom
14 the clarification issue is raised, and the number of
15 employees on each such classification;

16 (f) a statement setting forth the reason why petitioner
17 desires a clarification of the unit;

18 (g) a statement that no other employee organization is
19 certified to represent any of the employees who would be
20 directly affected by the proposed clarification;

21 (h) a brief and concise statement of any other relevant
22 facts; and

23 (i) the name, affiliation, if any, and the address of
24 petitioner.

25 (4) The party on whom the petition was served shall have
26 20 days to file a response with the board.

27 (5) Upon a determination that a question of fact exists,
28 the board shall set the matter for hearing. Upon
completion of the hearing the board may:

(a) grant the petitioned for clarification in whole or
in part, or

(b) deny the petitioned for clarification in whole or in
part.

18 B. The Respondent did not specifically contest that the
19 Petitioner met the above elements for filing the Unit Clarification
20 Petition. Rather, the Respondent claimed generally that the
21 Petitioner, by signing contracts with and recognizing the
22 Respondent (Section 39-31-109, MCA), had waived or abandoned the
23 right to seek this unit clarification.

24 The record is replete that the Respondent clearly knew of the
25 likelihood, and in fact, imminence of this UC (Finding No. 11;
26 Petitioner's proposed conclusion of law, no. 3 cites numerous
27 supporting transcript pages). There was no abandonment or waiver
28 by the Petitioner of its option to file the petition. Moreover,

1 there can be no "waiver" or "abandonment" (of the right to file a
2 petition) absent a "clear and unmistakable showing of waiver."
3 "Such a relinquishment must be in clear and unmistakable language."
4 (Tide Water Associated Oil Company, 24 LRRM 1518 at 1519 and 1520,
5 85 NLRB 1096; and Timken Roller Bearing Company v. NRLB, 54 LRRM
6 2785 at 2789 [1963]).

7 3. A. The position of battalion chief within the Great Falls
8 Fire Department meets the supervisory employee definition provided
9 in Section 39-31-103(11), MCA. That provision is as follows:

10 39-31-103. Definitions. When used in this
chapter, the following definitions apply:

11 * * * * *

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

18 The City of Great Falls rules and regulations relating to
19 battalion chiefs authorizes the battalion chiefs to have "full
20 command, control and responsibility of a platoon and shall be
21 responsible for the condition, discipline, efficiency, detailing of
22 subordinate members and notifying their supervisors of such
23 actions." The battalion chiefs are authorized to exercise that
24 authority under the direction of the assistant fire chief and fire
25 marshall. In addition, the battalion chiefs are charged with
26 significant fire scene management duties. The duties of the
27 battalion chiefs are consistent with the duties of a supervisory
28 employee.

1 B. The position of Battalion Chief has never approached the
2 definition of "management official" (Section 39-31-103 (7), MCA).

3 The language of this provision is set forth below:

4 39-31-103. Definitions. When used in this chapter, the
5 following definitions apply:

6 (7) "Management official" means a representative of
7 management having authority to act for the agency on any
8 matters relating to the implementation of agency policy.

9
10 The Montana Supreme Court looks to the construction placed on
11 the National Labor Relations Act (NLRA) by the federal courts as an
12 aid in interpretation of the Montana Public Employees Collective
13 Bargaining Act. Small v. McRae, 200 Mont. 497, 651 P.2d 982
14 (1982), followed in Brinkman v. State, 224 Mont. 238, 729 P.2d
15 1301 (1986).

16 The Petitioner has not emphasized that only those employees
17 who both "formulate and effectuate management policies by
18 expressing and making operative the decisions of their employer"
19 fit the "management" exemption carved out of the right for
20 employees to collectively bargain. (See Palace Laundry Dry Cleaning
21 Corp., 75 NLRB 320, 21 LRRM 1039 (1947); also quoted with approval
22 in Yeshiva University, supra. The Great Falls Battalion Chiefs do
23 not formulate Departmental policies. Only the Fire Chief and the
24 Deputy Chief, in conjunction with the City Manager, the City
25 Commission, and with benefit of counsel, formulate policies.

26 In Yeshiva, supra, the U.S. Supreme Court said "managerial
27 employees must exercise discretion within or even independently of
28 established employer policy and must be aligned with management."

1 Here, the Petitioner's BCs position description sets down the
2 limits and constraints on the presumed authority the BCs' are to
3 exercise. This Petitioner-generated document is evidence of the
4 limitations which have traditionally restricted the BCs' authority
5 to operate independently, or to exercise discretion and independent
6 judgment beyond policies handed down from upper levels of
7 management (Finding No. 48).

8 4. The Battalion Chiefs continue to meet both the Board of
9 Personnel's tests and the National Labor Relations Board's [NLRB]
10 tests for inclusion within the recognized bargaining unit (Finding
11 Nos. 35-43, 47-49; 51-54).

12 The statutory requirements are set out in Section 39-31-202,
13 MCA:

14 39-31-202. Board to determine appropriate
15 bargaining unit -- factors to be considered. In
16 order to assure employees the fullest freedom in
17 exercising the rights guaranteed by this chapter,
18 the board or an agent of the board shall decide the
19 unit appropriate for the purpose of collective
20 bargaining and shall consider such factors as
21 community of interest, wages, hours, fringe
benefits, and other working conditions of the
employees involved, the history of collective
bargaining, common supervision, common personnel
policies, extent of integration of work functions
and interchange among employees affected, and the
desires of the employees.

22 The demonstrated community of interests, wages, hours, fringe
23 benefits, history of collective bargaining, common supervision,
24 common personnel policies and the complete integration of work
25 functions and interchange among the affected employees, and the
26 clear and unequivocal desire of the employees have all been met
27 (ARM 24.26.611).

1 The cohesiveness of the employees in the unit was amply shown
2 (Finding No. 34). The NLRB has been reluctant to disturb
3 longstanding bargaining units and bargaining history is customarily
4 accorded great weight. Tool Craftsmen v. Leedom, 276 F.2d 136, 45
5 LRRM 2826 (CA DC), cert. denied, 364 US 815 (1960).

6 Our Montana Supreme Court recognized this principle in
7 Billings Firefighters, supra. Unit composition, however, is not
8 set in stone. However, in this case, there has been no showing of
9 sufficient reasons or bona fide factors to disturb the status quo.
10 The undersigned is mindful that the Petitioner's cost concerns are
11 legitimate. Yet, economic hardship arguments alone cannot prevail
12 given the statutory framework (See Peters v. State Cascade ADV-91-
13 1172; summary judgment December 21, 1994 and settlement March 8,
14 1995, reported in Montana Law Week, 7/22/95).

15 The Petitioner's reliance on Unit Clarification No. 6-80 v.
16 Department of Administration, 217 Mont. 230, 703 P.2d 862 (1985),
17 is misplaced. That case is distinguished as the instant case has
18 no proposed change of the recognized bargaining representative.
19 The I.A.F.F. has not been challenged. In Unit Clarification, No.
20 6-80, supra, the workers' representative was decertified and
21 replaced by another union. That case is therefore inapposite.

22 5. The inclusion of the Battalion Chiefs within the
23 bargaining unit has not created conflicts of interest, nor been a
24 source of strife within the unit. The BCs' union membership has
25 not caused "actual substantial conflict (Billings Firefighters,
26 supra at 427)."

27 Section 39-31-101, MCA states:

28 39-31-101. Policy. In order to promote public business
by removing certain recognized sources of strife and

1 unrest, it is the policy of the state of Montana to
2 encourage the practice and procedure of collective
3 bargaining to arrive at friendly adjustment of all
4 disputes between public employers and their employees.

5 The undersigned notes but does not fully explore the
6 Respondent's argument that the Board may have engaged in improper
7 rule adoption with the second requirement it imposed through its
8 "two-prong test" enunciated on July 28, 1978, in its early-stage
9 review of the Billings Firefighter case above. The Respondent
10 claims that the requirements for public rule notice, comment, and
11 rule adoption under the Montana Administrative Procedure Act, at
12 Section 2-4-305 (5), MCA were not followed. The Respondent's
13 arguments are set out in the Respondent's proposed conclusions of
14 law, pages 29 to 32. As the arguments touch on other
15 constitutional and rule-making standards, they are preserved for
16 any appellate review. It does not appear appropriate for an agent
17 of the Board to presume to rule on the legality of what appear to
18 be earlier (1978) Board rules. Such an offer by counsel to examine
19 this second test is not essential to the outcome here, as the
20 question is answered favorably to the Respondent.

21 That second "question," as stated by the Respondent reads:

22 If it does [is the position management or
23 supervisory], does the inclusion of that
24 position in the bargaining unit create an
25 actual substantial conflict which results in
26 the compromising of the interests of any party
27 to its detriment?

28 If accurately quoted, the second prong does raise an
interesting perplexing question. That is, any party to a labor
dispute or unit clarification would presumably always maintain that

1 its interests are somehow compromised by the inclusion or exclusion
2 of certain individuals and jobs.

3 The Supreme Court decided in the Billings Firefighters, supra
4 at 434, that "no actual substantial conflict exists." This Hearing
5 Officer concludes the same as it pertains to the Battalion Chiefs'
6 twenty-nine year membership in the Great Falls Fire Department.

7 The Petitioner has not focused on conflicts within the unit,
8 but rather on external conflicts, found to have largely been
9 fostered by the Petitioner's antagonism to the bargaining unit.

10 John Lawton admitted under cross examination that when labor
11 disputes had arisen, they had been settled professionally within
12 the terms of the contract(s) (Finding No. 17). Mr. Lawton's
13 prepared statements for the City Commission quoted in Finding No.
14 9, include: "I think our discussions have been respectful...I don't
15 think that we have had the kind of animosity... (Exhibit B, 3).

16 Much of the unfortunate disagreements cited by the Petitioner
17 can be honestly attributed to Richard Mesinger's behavior toward
18 Respondent and his management style. The spike in
19 complaints/grievances during his twenty-two month tenure was an
20 aberration in typical Great Falls labor-management relations
21 (Finding No. 54). Grievances, moreover, are a right of both
22 parties.

23 The attitudes toward the Respondent as evinced in the words of
24 John Lawton and Richard Mesinger, and quoted at length in Finding
25 Nos. 9, 13, 17, and 29 - 38 and 50, establish the source of
26 "strife," to the extent it exists. The Petitioner ignored
27 recommendations by BCs (Finding No. 36), and provoked most of the
28 grievances referenced in Finding Nos. 37 - 43 and 45, 47). The

1 Petitioner-adopted new job description (Exhibit V) emphasizes how
2 little authority is conferred on the BCs, as does one of BC Sisco's
3 efforts at discipline (Finding Nos. 41 and 48).

4 The Petitioner failed in its burden of proof to disturb the
5 status quo of "grandfathered" workers protected by the 1973 law
6 (Section 39-31-109, MCA):

7 **39-31-109. Existing collective bargaining agreements**
8 **not affected.** Nothing in this chapter shall be construed
9 to remove recognition of established collective
bargaining agreements already recognized or in existence
prior to July 1, 1973.

10 The right to self-organization, the wishes of the workers,
11 including all but one unit member contacted, the longstanding
12 history, the appropriateness of the unit, and ultimately, the
13 promotion of the public policy set out in Section 39-31-101, MCA
14 above, lead to a denial of the Petitioner's request.

15 This decision acknowledges Conclusion No. 3. A., that under
16 the application of the "secondary" tests apart from the "primary"
17 tests to determine what are "supervisory positions," the BCs would
18 not meet the definition of "public employee." (Section 39-31-103
19 (9) (iii), MCA). The Montana Supreme Court ruled in Billings
20 Firefighters, supra, at 432, that the inclusion of supervisory
21 personnel or management officials in the bargaining unit is not
22 inherently conflicting. If the BCs were otherwise excludable as
23 supervisory personnel, the "grandfathering" provision protects
24 them, based on the evidence presented to date.

25 VI. RECOMMENDED ORDER

26 The Petitioner's request filed on June 16, 1994, to remove the
27 Great Falls Fire Department Battalion Chiefs from the recognized
28 bargaining unit, the I.A.F.F. Local No. 8, is DENIED.

1 DATED this 20 day of November, 1996.

2 BOARD OF PERSONNEL APPEALS

3
4 By: James C. Rice, Jr.

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 8-94:

CITY OF GREAT FALLS,)	
GREAT FALLS, MONTANA)	
Petitioner)	
- vs -)	FINAL ORDER
INTERNATIONAL ASSOCIATION OF)	
FIREFIGHTERS LOCAL NO. 8)	
Defendant)	

The above-captioned matter came before the Board of Personnel Appeals (Board) on September 19, 1996. Appearing before the Board were David V. Gliko, attorney for petitioner, and Timothy J. McKittrick, attorney for respondent.

At issue before the Board was consideration of the petitioner's appeal from the recommended findings of fact; conclusions of law; and final order issued by a hearing officer on May 2, 1996. The hearing officer's recommended order denied the petitioner's request to remove the Great Falls Fire Department battalion chiefs from the bargaining unit. The Board concludes that the ultimate decision reached by the hearing officer is correct, however, the Board also believes that the hearing officer erred in his conclusion of law number 3A. That conclusion found the battalion chiefs to not be management or supervisory personnel. The Board expressly rejects proposed conclusion of law number 3A and replaces it with the following conclusion of law:

3. A. The position of battalion chief within the Great Falls Fire Department meets the supervisory employee definition provided in Section 39-31-103(11), MCA. That provision is as follows:

39-31-103. Definitions. When used in this chapter, the following definitions apply:

(11) "Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The City of Great Falls rules and regulations relating to battalion chiefs authorizes the battalion chiefs to have "full command, control and responsibility of a platoon and shall be responsible for the condition, discipline, efficiency, detailing of subordinate members and notifying their supervisors of such actions." The battalion chiefs are authorized to exercise that authority under the direction of the assistant fire chief and fire marshal. In addition, the battalion chiefs are charged with significant fire scene management duties. The duties of the battalion chiefs are consistent with the duties of a supervisory employee.

After substitution of the hearing officer's conclusion of law 3A, with the above, the Board believes that the remainder of the hearing officer's decision is correct. The Board adopts the remainder of the hearing officer's decision as its own.

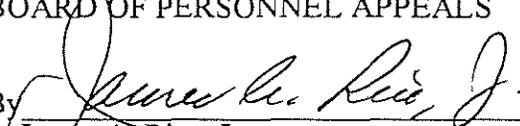
1 Accordingly, the Board orders as follows:

2 1. IT IS HEREBY ORDERED that the hearing officer's recommended findings of fact;
3 conclusions of law; and recommended order are adopted by the Board except for the hearing officer's
4 conclusion of law number 3A, which is replaced with the Board's conclusion of law 3A, stated
5 above. The findings of fact; conclusions of law; and order as modified by the Board are attached.

6 2. IT IS FURTHER ORDERED that consistent with the hearing officer's recommended
7 order, the petitioner's request to remove the Great Falls Fire Department Battalion Chiefs from the
8 recognized bargaining unit is DENIED.

9 Dated this 20 day of November, 1996.

10 BOARD OF PERSONNEL APPEALS

11 By 
12 James A. Rice, Jr.
13 Presiding Officer

14 *****
15 Board members Rice, Schneider, Henry and Hagan concur.
16 Board member Talcott dissents.
17 *****

18 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by
19 filing a petition for Judicial Review with the District Court no later than thirty (30) days from the
20 service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

21 *****
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CERTIFICATE OF MAILING

I, Adlene Barnes, do hereby certify that a true and correct copy of this document was mailed to the following on the 21 day of November, 1996:

David V. Gliko
Great Falls City Attorney
PO Box 5021
Great Falls MT 59403-5021

Timothy J. McKittrick
McKittrick Law Firm PC
PO Box 1184
Great Falls MT 59403-1184

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CLERK OF DISTRICT COURT
PATRICY HOLTON

**EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CASCADE
STATE OF MONTANA**

JAN -3 PM 3:39

FILED

CITY OF GREAT FALLS,
GREAT FALLS, MONTANA

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL UNION NO. 8,

Respondent.

BY _____
DEPUTY

Cause No. CDV-96-1472

ORDER AND JUDGMENT ON
PETITION FOR JUDICIAL
REVIEW

The City of Great Falls filed a Petition For Unit Clarification with the State of Montana, Department of Labor & Industry, seeking to exclude Battalion Chiefs from the collective bargaining unit represented by International Association of Firefighters Local Number 8. On May 23rd and 24th 1995, a hearing was held before Hearing Examiner Stephen Wallace. At the hearing, exhibits were introduced and testimony of witnesses was taken. On May 2, 1996, the Hearing Examiner entered Findings of Fact, Conclusions of Law and recommended Order in favor of the Union and denying the City's Petition For Unit Clarification. The City of Great Falls appealed the Hearing Examiner's decision to the Board of Personnel Appeals. Briefs were submitted and oral argument heard. On November 20, 1996, the five (5) member Board of Personnel Appeals affirmed the Hearing Examiner's decision and denied the City's Petition to remove the Battalion Chiefs from the collective bargaining unit. The City

filed a Petition for Judicial Review of the Board of Personnel Appeals final order with the Eighth Judicial District Court in Cascade County, Montana. Briefs were filed and oral argument heard on April 15, 1998. Based on the record, the evidence and law, the Court is now prepared to enter a judgment and order on the City's Petition For Judicial Review.

The City of Great Falls in its Petition For Judicial Review claimed that several Findings of Fact were erroneous in view of the reliable, probative and substantial evidence, and the effect of the evidence was misapprehended, and the Hearing Examiner and Board of Personnel Appeals made mistakes concerning the Findings of Fact. The City also claimed that the Conclusions of Law were arbitrary, capricious and characterized by an abuse of discretion.

The Union filed an Answer and Counter-Petition For Judicial Review. The Union requested the Court to rule that the two-pronged test enunciated in *City of Billings vs. Billings Firefighters*, 200 Mont. 421, ___ P.2d ___, (1982) is in violation of the United States Constitution, Article I, Section 10; the Fourth Amendment; the Montana Constitution, Article II, Sections 17 and 31; the Montana Administrative Procedure Act; and the policy of the Montana Collective Bargaining For Public Employees Act.

The Union also argued that the City's Petition For Unit Clarification and remedy sought was a violation of Article II, Section 31 of the Montana Constitution and Article I, Section 10 of the United States Constitution.

The Union also asked the District Court to reverse the Board's Conclusion of Law that the Battalion Chiefs are not supervisory employees.

Finally, the Union argued that it should be awarded attorney fees and costs pursuant to §25-10-711, M.C.A.

On page 6, paragraph 4b of the Hearing Examiner's Finding of Fact, Conclusions of Law and Order, the Hearing Examiner stated:

“At the earliest possible time, the respondent (Union) raised the alleged federal and state Constitutional issues of protected activities, said to be violated by the Petitioner's requests herein. The Hearing Officer acting on behalf of the Board, lacks subject matter jurisdiction to adjudicate constitutional issues. *Jursusi v. Board of Trustees*, 204 Mont. 131, 664 P.2d 316 (1983). Therefore, these requested issues cannot be addressed, but are acknowledged for any further appellate review.”

Since the constitutional and MAPA violations were not ripe for review at the Board of Personnel Appeals level, no decision was rendered thereon. Those issues however, were properly preserved and were presented to the District Court for a decision.

STANDARD OF REVIEW

In *Synek v. State Fund*, 272 Mont. 246, 900 P.2d 884 (1995) the Supreme Court held:

“In reviewing an Agency's decision in a contested case procedure under the Montana Administrative Procedure Act, reviewing courts apply the standards of review contained in §2-4-704 M.C.A.; *State Comp Mutual vs. Lee Rost*

Logging, (1992), 252 Mont. 97, 102, 827 P.2d 85, 88.”

Section 2-4-704(2) M.C.A. provides:

“The court may not substitute its judgment for that of the Agency’s as to the weight of the evidence or questions of fact.”

The City in its Petition, invokes the “clearly erroneous” standard as set forth in §2-4-204(2)(a)(2) M.C.A. in asking the District Court to reverse the decision of the Board of Personnel Appeals. That statute reads:

“The court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because: (a) the administrative findings, inferences, conclusions or decisions are (b) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.”

In reviewing findings under the clearly erroneous standard, the Court has adopted the following three part test:

“First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of the evidence. (Citation omitted). Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may still find that “[a] finding is ‘clearly erroneous’ when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.” *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

Interstate Production Credit v. DeSay, 830 P.2d 1285, 1287 (Mont. 1991):

“The credibility and weight accorded evidence and witnesses by the trial court **must be given great weight on appeal.**” *Morning Star Enterprises v. R.H. Grover*, 805 P.2d 553, 558 (Mont. 1991) (Emphasis added). “This Court’s function is not to substitute its judgment for the trier of fact.” *Interstate*, 820 P.2d at 1287.

“When conflicting evidence is presented, the scope of review is to establish whether substantial evidence supports the lower court’s findings, not whether the evidence may support contrary findings.” *Smith-Carter v. Amoco Oil Co.*, 813 P.2d 405, 408 (Mont. 1991). The lower court is recognized as having “the duty to resolve conflicts in the evidence.” *Wood v. Ulmer’s Car & Truck*, 769 P.2d 1264, 1268 (Mont. 1989).

Substantial evidence has been defined as:

[T]hat evidence that a reasonable mind might accept as adequate to support a conclusion.

Davis v. Church of Jesus Christ of Latter Day Saints, 796 P.2d 181, 184 (Mont. 1990). Although evidence may be inherently weak and conflicting, it may still be considered substantial. *Whiting v. State*, 810 P.2d 1177, 1181 (Mont. 1991).

A Court:

“will not overturn findings of fact and conclusion of law if supported by substantial evidence and by the law.” *Toeckes v. Baker*, 611 P.2d 609, 611 (Mont. 1980).

When the:

“[c]ourt find[s] substantial evidence to support the findings of fact . . . the appellant must demonstrate a misapplication of law to prevail on appeal.” *Id.* “The conclusions of law must be founded on and supported by the findings of fact.” *Farmers, Inc. V. Dal Machine and Fabricating, Inc.*, 800 P.2d 1063, 1065 (N.M. 1990).

The Union argued that the Board of Personnel Appeals, in adopting the two-prong test described in the *City of Billings, supra*, violated the MAPA because the Agency did not follow specific procedures such as notice, hearing and publication when adopting rules. It is the ruling of this court that since the Supreme Court in the *City of Billings, supra*, utilized the two-prong test as adopted by the Board of Personnel Appeals, this court will not overturn the standard utilized by the Supreme Court in the *City of Billings*. Thus, the two-prong test as adopted by the BPA in the *City of Billings*, did not violate the MAPA.

The Union next argued that the two-prong test as adopted and applied by the Board of Personnel Appeals in the *City of Billings, supra*, engrafts additional and contradictory requirements on the collective bargaining statute, which were not envisioned by the legislature. On that basis, the Union argues that the two-prong test is out of harmony with the Public Employees Collective Bargaining Act and therefore, is invalid. It is the opinion of the court that the two-prong test as enunciated in the *City of Billings, supra*, case did not engraft additional or contradictory

requirements on the Montana Collective Bargaining Act, and thus, the two-prong test is not invalid.

The Union also argued that the Petition For Judicial Review and relief sought by the City is in violation of the state and federal Constitution that prohibits passage of any *ex post facto* law or law impairing the obligation of contracts. As will be established in this Order, the court affirms the decision of the Board of Personnel Appeals and therefore, it is not necessary to address the constitutional issues regarding the impairment of contracts or the *ex post facto* doctrine raised by the Union.

It is undisputed that the bargaining unit represented by IAFF Local No. 8 (Union) is described in Article II, sub-section 2.1 of the collective bargaining agreement entered into between the Union and the City of Great Falls, with an effective date of July 1, 1993 through June 30, 1995. The Recognition Clause in the Collective Bargaining Agreement recognizes the Battalion Chiefs as being members of the collective bargaining unit. The collective bargaining relationship between the Union and the City of Great Falls has existed since prior to July 1, 1973. Since at least 1967 and continuing to the present date, Battalion Chiefs have always been members of the collective bargaining unit represented by the Union and recognized by the City of Great Falls.

Section 1.2 of the Collective Bargaining Agreement provides:

“It is the purpose of this agreement to achieve and maintain harmonious relations between the City and the Union, and to establish proper standards of wages, hours and other conditions of employment.”

Article 2, the Recognition Clause of the Collective Bargaining Agreement under Section 2.1 provides:

“The City recognizes the Union as the exclusive collective bargaining agent for all union members, excluding the chief, assistant chief and fire marshall, and all initial probationary employees of the Great Falls Fire Department.”
(Emphasis added)

Section 39-31-109 M.C.A., the grandfather clause of the Montana Public Employee Collective Bargaining Act provides:

“Nothing in the chapter shall be construed to remove recognition of established collective bargaining agreements recognized or in existence prior to July 1, 1973.”

The Board of Personnel Appeals applied the two-pronged test as enunciated in *City of Billings, supra*. The Board of Personnel Appeals cited the right to self-organization, the wishes of the workers, the long-standing history, the appropriateness of the unit and public policy and held that the “grandfather clause” protects the Battalion Chiefs and denied the City’s Petition to remove the Battalion Chiefs from the unit. The decision of the Board of Personnel Appeals is hereby affirmed.

In *City of Billings v. Billings Firefighters, Local No. 521*, 200 Mont. 421, 651 P.2d 627 (1982) the Montana Supreme Court held that Section

39-31-109 M.C.A. recognizes all bargaining agreements in existence on July 1, 1973. The court, referring to the recognition clause in the collective bargaining agreement, stated that by recognizing the agreement the employer recognizes the unit. The unit does not cease to exist when the agreement ends. The unit continues to exist until a new unit is formed and recognized. In the instant case, it is undisputed that the collective bargaining unit has been in existence and remained the same since at least 1967. It is further undisputed that no question of representation was ever raised by the City in this case.

The two-pronged test enunciated in *City of Billings, supra*, provides:

- (1) Is the position in question that of a supervisor or management official?
- (2) If it is, does the inclusion of that position within the unit become a source of "strife and unrest" evidenced by actual substantial conflict. If so, the position will be removed from the unit. If there is no strife or unrest, the grandfathered unit will be allowed to remain "as is."

The Board of Personnel Appeals ruled the position of Battalion Chief within the City of Great Falls Fire Department meets the supervisory employee definition provided in section 39-31-103(11) M.C.A. Although the Board of Personnel Appeals found that much of the Battalion Chiefs authority was illusory, the Battalion Chiefs are charged with significant fire scene management duties. In light of the reliable, probative and

substantial evidence on the whole record, the conclusion of the Board of Personnel Appeals that the duties of the Battalion Chiefs are consistent with the duties of a supervisory employee is not clearly erroneous and therefore is hereby affirmed.

The Board of Personnel Appeals ruled that the position of Battalion Chief has never approached the definition of “management official” as defined by §39-31-103 M.C.A. The City has placed limitations on the Battalion Chief’s authority to operate independently, to exercise discretion and independent judgment beyond policies handed down from upper levels of management. In light of the reliable, probative and substantial evidence on the whole record, the conclusion of the Board of Personnel Appeals that the Battalion Chiefs are not managers, is not clearly erroneous and therefore is hereby affirmed.

The Board of Personnel Appeals ruled the inclusion of the Battalion Chiefs within the bargaining unit has not created conflicts of interest, nor been a source of strife within the unit. The Battalion Chief’s union membership has not caused actual substantial conflict. The Board of Personnel Appeals found that the City did not focus on conflicts within the unit, but rather on external conflicts, found to have largely been fostered by the City’s antagonism toward the bargaining unit.

Fire Chief HIROSE testified that when he was a Battalion Chief in 1985, he personally felt conflicted because he felt his allegiance was more

to the union than to carrying out functions as a Shift-Commander. There is no evidence in the record that this “internal personal conflict” of 14 years ago caused any strife or unrest in the fire department at that time. Indeed, the fact that Mr. HIROSE now holds the position of Fire Chief would indicate otherwise. The evidence in the record establishes that a vast majority of firefighters (47) including every single Battalion Chief affected by this instant Unit Clarification Petition testified by way of a signed petition that the inclusion of Battalion Chiefs in the unit was not a source of strife or unrest and that they all wanted the Battalion Chiefs to remain in the unit.

The Board of Personnel Appeals cited testimony in the record which established that prior to becoming Great Falls City Manager, and Great Falls Fire Chief, JOHN LAWTON and RICHARD MEISINGER respectively, held the opinion and attitude that Battalion Chiefs should not be members of the collective bargaining unit. Indeed, prior to filing the Petition For Unit Clarification, the City unsuccessfully attempted to bargain the Battalion Chiefs out of the unit.

During MEISINGER’s tenure of twenty-two (22) months, between 15 and 20 grievances were filed as compared to about one grievance per year before and after MEISINGER was Fire Chief. The Board of Personnel Appeals ruled that the grievances can be honestly attributed to MEISINGER’s behavior toward the union and his management style. The

evidence established that prior to coming to Great Falls, MEISINGER had no experience as a Fire Department Officer within an organized labor union, or any experience with collective bargaining.

The Board of Personnel Appeals ruled that the overwhelming weight of evidence supports a finding that to the extent "strife" has occurred, it has not been caused by the Battalion Chiefs membership in the union. The grievances cited merely establish that the differences can be resolved within the existing framework of the grievance procedure.

Based on the reliable, probative and substantial evidence on the whole record, the conclusion that the inclusion of Battalion Chiefs within the bargaining unit has not created conflicts of interest, nor been a source of strife within the unit, is not clearly erroneous and therefore is hereby affirmed.

DATED this 30th day of Dec, ²⁰⁰⁰1998.



Marge Johnson
DISTRICT COURT JUDGE

c. Timothy J. McKittrick
David Gliko

1 Judicial Review on April 15, 1998. At the hearing she orally indicated that she was affirming
2 the decision of the Board of Personnel Appeals. An actual written order was not signed by
3 Judge Johnson until December 30, 2000, two and one half years after the hearing. Judge
4 Johnson's Order was not filed with the Clerk of Court until January 3, 2001. Judge Johnson's
5 last day in office was December 31, 2000.

6 On January 22, 2001, the Petitioner filed a Rule 59 Motion requesting the Court vacate
7 the January 3, 2001, Order so as to allow the Board of Personnel Appeals to consider changes
8 in circumstances which had occurred since the Board, and the Court, had heard this matter. In
9 the alternative, the Petitioner requested that the Court vacate and amend the January 3, 2001,
10 Order in favor of the Petitioner.

11 On February 1, 2001, the Court received an order from the Montana Supreme Court in
12 Schmit-Lorenz v. Mid-Century Insurance Co., No. 00-345; another case in which Judge Johnson
13 signed an order while still in office - but which did not get filed by the Clerk of Court's office
14 until January 3, 2001. In Schmit-Lorenz the Montana Supreme Court indicated that any orders
15 signed by Judge Johnson before December 31, 2000, which were not docketed until after
16 January 1, 2001, must be stricken - as Judge Johnson was without authority to file any orders
17 past December 31, 2000. On February 5, 2001, the Court issued an Order in this matter
18 informing the parties of the Schmit-Lorenz decision, and allowing the parties to submit additional
19 motions and memorandum.

20 The Court has reviewed the motions, briefs, affidavits, and oral arguments of the parties.
21 Additionally, the Court takes judicial notice, pursuant to Rule 201(d), M.R.E., of this Court's
22 Order dated March 27, 2001, issued in International Association of Firefighters Local No. 8 and
23 Kelly Hunter v. City of Great Falls, Cause No. ADV-97-349(b), in which the Union contested,
24 among other things, the validity of the recommendations of a Battalion Chief regarding the
25 termination of the employment of a probationary employee. The affidavits filed in this case, and
26 the above-mentioned March 27, 2001, Order, present material evidence related to the issues of

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1 whether the Battalion Chiefs desire to remain in the Union, and whether there is strife within
2 the Union because of the continued inclusion of the Battalion Chiefs as members of the
3 bargaining unit. This evidence did not exist at the time of the underlying administrative
4 proceedings.

5 Section 2-4-703, MCA, states:

6 If, before the date set for hearing, application is made to the court for leave to
7 present additional evidence, and it is shown to the satisfaction of the court that
8 the additional evidence is material and that there were good reasons for failure
9 to present it in the proceeding before the agency, the court may order that the
10 additional evidence be taken before the agency upon conditions determined by the
11 court. The agency may modify its findings and decision by reason of the
12 additional evidence and shall file that evidence and any modifications, new
13 findings, or decisions with the reviewing court.

14 The Court's February 5, 2001, Order established May 1, 2001, as the hearing date in this
15 matter. The Petitioner filed its Motion to Present Additional Evidence pursuant to §2-4-703,
16 MCA, on April 2, 2001. Although the Court has expressed concern that the Petitioner did not
17 file its motion at the time it became aware of the additional evidence (as early as April of 2000),
18 the Court finds that the Petitioner did file its motion in a timely manner pursuant to §2-4-703,
19 MCA.

20 Based on the Court's finding that there is material additional evidence for which there
21 were good reasons for failure to present such evidence at the administrative proceedings, and
22 based on the Petitioner's timely filing of its motion concerning the additional evidence, the Court
23 is remanding this matter back to the Department of Labor and Industry for further proceedings.
24 The Court defers to the Department of Labor and Industry's procedures as to whether the Board
25 of Personnel Appeals or some other entity within the Department will handle the remand.

26 The Department of Labor and Industry shall have 60 days from the date of transmittal
of this Order, exclusive of relevant time periods allowed under the Montana Rules of Civil
Procedure, to complete the evidentiary hearing in this matter. The Department shall have 30
days following the evidentiary hearing to file with the Court any new evidence received; and any
modifications, new findings, or decisions by the Department related to this matter.

1 If the Department is unable to meet the above deadlines, the Department shall appear
2 through counsel and file the appropriate motions for relief under this Order. Such motions shall
3 be supported by affidavit showing good cause why any terms of this Order cannot be met.
4 Additionally, such motions shall specifically provide the Court with a proposed order setting
5 forth the terms and conditions the Department feels are reasonable.

6 Upon the Department's filing of additional evidence, modifications, new findings, or
7 decisions, the Court will conduct a scheduling conference to effect a timely resolution of this
8 matter.

9 Based on the foregoing discussion, the Respondent's Motion to Reinstate Judge Johnson's
10 January 3, 2001, Order is denied.

11 IT IS HEREBY ORDERED that:

- 12 1. The Petitioner's Motion for Remand is GRANTED as set forth above.
13 2. The Respondent's Motion to Reinstate Judge Johnson's January 3, 2001, Order
14 is DENIED.

15 DATED this 4th day of June, 2001.

16 
17 _____
18 JULIE MACEK
DISTRICT COURT JUDGE

19 cc: Patrick Watt
20 David Gliko
21 Timothy J. McKittrick
22 Department of Labor and Industry
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

CITY OF GREAT FALLS,)
GREAT FALLS, MONTANA,)
)
Petitioner,)
)
vs.)
)
INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS LOCAL)
UNION NO. 8,)
)
Respondent.)

ORDER ON REMAND

The above captioned matter came before the Board of Personnel Appeals on June 28, 2001, pursuant the June 8, 2001, "Order" of the District Court of the Eighth Judicial District, in and for the County of Cascade. Said "Order" remanded this matter back to the Montana Department of Labor and Industry for a supplemental evidentiary hearing into ". . . whether the Battalion Chiefs desire to remain in the Union, and whether there is strife within the Union because of the continued inclusion of the Battalion Chiefs as members of the bargaining unit."

In addition to the above-directive said "Order" stated that "[t]he Court defers to the Department of labor and Industry's procedures as to whether the Board of Personnel Appeals or some other entity within the Department will handle the remand."

This matter is subject to the jurisdiction of this Board, and so, in accordance with the "Order" of the District Court, the Board directs as follows:

1. IT IS HEREBY ORDERED that this case is remanded to the Hearings Bureau of the Montana Department of Labor and Industry for assignment of a Board hearings officer to conduct a supplementary evidentiary hearing into ". . . whether the Battalion Chiefs desire to remain in the Union, and whether there is strife within the Union because of the continued inclusion of the Battalion Chiefs as members of the bargaining unit."
2. IT IS FURTHER ORDERED that the assignment of a hearings officer and the taking of the supplementary evidence be expedited in order to comply with the sixty (60) day deadline set by the Court in its "Order" of June 8, 2001.

Dated this 24~~th~~ day of June, 2001.

BOARD OF PERSONNEL APPEALS

By: _____


Jack Holstrom
Presiding Officer

Board members Schneider, Vagner, Reardon and O'Neill concur.

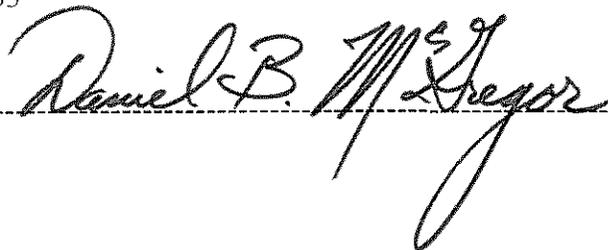
CERTIFICATE OF MAILING

I, Daniel B. McGREGOR, do hereby certify that a true and correct copy of this document was mailed to the following on the 28th day of June, 2001.

Patrick Watt
Attorney at Law
P.O. Box 2269
Great Falls, MT 59403

David Gliko
P.O. Box 5021
Great Falls, MT 59403

Timothy J. McKittrick
Attorney at Law
P.O. Box 1184
Great Falls, MT 59403



8/30/01

RECEIVED SEP 4 2001

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 01-565

FILED

AUG 30 2001

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,)
LOCAL NO. 8,)

Petitioner,)

v.)

THE EIGHTH JUDICIAL DISTRICT COURT,)
CASCADE COUNTY and THE HONORABLE)
JULIE MACEK, Presiding Judge, and THE CITY OF)
GREAT FALLS, MONTANA,)

Respondents.)

ORDER

The Applicant, International Association of Firefighters, Local No. 8, has petitioned this Court for Supervisory Control pursuant to Rule 17, M.R.App.P.

In support of its application, the Association informs this Court that the State Board of Personnel Appeals affirmed a hearing examiner's decision which denied a petition by the City of Great Falls to remove Battalion Chiefs from its collective bargaining unit and that that decision was affirmed on judicial review by the District Court, the Honorable Marge Johnson presiding, on December 30, 2000. The Association alleges, however, that on February 5, 2001, Judge Johnson's replacement, the Honorable Julie Macek, struck Judge Johnson's order and judgment sua sponte and requested additional motions and briefs. On June 4, 2001, Judge Macek denied the Association's motion to reinstate Judge Johnson's order and granted the City's motion to remand the case back to the Department of Labor for additional evidence. The Department of Labor has now entered a scheduling order and briefing schedule.

The Association contends that this Court should exercise supervisory control and stay further proceedings before the Department of Labor because the District Court acted in violation of law and that absent action by this Court to apply the law correctly, the parties

will be forced to a needless cycle of trial, appeal, and retrial. It is the Association's position that Judge Macek misapplied the law when she concluded that this Court's order in *Schmit-Lorenz v. Mid-Century Insurance Company*, No. 00-345, required that Judge Johnson's order be stricken. According to the Association, the District Court erred as a matter of law for the following reasons:

1. *Schmit-Lorenz* was erroneously decided because Judge Johnson's order was signed while she still held office and had authority to act.

2. *Schmit-Lorenz* did not apply to oral judgments and, therefore, Judge Johnson's April 15, 1998, oral judgment in the Association's favor should be enforced.

3. Because this case was tried and a decision rendered, principles of *res judicata* preclude remanding to the Department of Labor for further consideration.

The Association offers additional reasons why Judge Macek acted incorrectly. However, those arguments are factually based and not appropriate for resolution by supervisory control.

This Court has considered the Association's application for a Writ of Supervisory Control and concludes that it is appropriate that a summary response be filed. Therefore,

IT IS HEREBY ORDERED that:

1. The City of Great Falls shall respond to those claims made by the Association and identified in paragraphs 1 through 3 of this Order within 14 days from the date of this Order.

2. The unit clarification proceedings currently pending before the State of Montana Board of Personnel Appeals in the case entitled *In The Matter of the Unit Clarification No. 8-94, City of Great Falls, Great Falls, Montana, Petitioner, v. International Association of Firefighters Local No. 8, Defendant*, are stayed pending our disposition of the Association's application in this matter.

3. The Clerk of Court is directed to notify the parties of this Order by mailing a copy to Timothy J. McKittrick, P.O. Box 1184, Great Falls, Montana 59403; Patrick R. Watt, P.O. Box 2269, Great Falls, Montana 59403; David Gliko, P.O. Box 5021, Great Falls, Montana

59403; and The Honorable Julie Macek, Cascade County Courthouse, Great Falls, Montana
59401.

DATED this 30th day of August, 2001.

Karla M. Gray
Chief Justice

Troy Trivitt

Jim Regnier

Jim Rice

William Buehler

Patricia Cotter

Justices

Justice Jim Rice did not participate in this matter.

1/31/02

No. 01-565

IN THE SUPREME COURT OF THE STATE OF MONTANA

2002 MT 17

FILED

JAN 31 2002

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

INTERNATIONAL ASSOCIATION)
 OF FIREFIGHTERS, LOCAL NO. 8,)
)
 Petitioner,)
)
 v.)
)
 THE EIGHTH JUDICIAL DISTRICT COURT,)
 CASCADE COUNTY, and THE HONORABLE JULIE)
 MACEK, Presiding Judge, and THE CITY OF)
 GREAT FALLS, MONTANA,)
)
 Respondents.)

OPINION
AND
ORDER

¶1 The Petitioner, International Association of Firefighters, Local No. 8, has petitioned this Court for a Writ of Supervisory Control over the Respondents, the District Court for the Eighth Judicial District in Cascade County, and the Honorable Julie Macek, presiding judge. In support of its petition, the Union submits the following facts which are in all relevant particulars undisputed by the Respondents.

¶2 On July 16, 1994, the City of Great Falls filed a unit clarification petition with the Department of Labor, Board of Personnel Appeals, in an effort to have Battalion Chiefs removed from the collective bargaining unit represented by the Union. Following a hearing and the presentation of evidence, the Department's hearing examiner returned a recommended order in favor of the Union. That decision was appealed to the Board of Personnel Appeals which affirmed the hearing examiner and denied the City's petition to

remove the Battalion Chiefs from the collective bargaining unit.

¶3 The City then filed a petition for judicial review in the District Court for the Eighth Judicial District in Cascade County. Following oral argument before the Honorable Marge Johnson, Judge Johnson pronounced orally that she would affirm the Board of Personnel Appeals. That pronouncement was entered in the minutes of record in the District Court. However, Judge Johnson did not reduce her order to writing until December 30, 2000. Judge Johnson's term of office expired at midnight on December 31, 2000, and her written order was officially filed with the Clerk of the District Court on January 3, 2001.

¶4 On February 5, 2001, the Respondent, the Honorable Julie Macek, Judge Johnson's successor, struck Judge Johnson's order and judgment and directed that the parties file additional motions and briefs. She did so in reliance on this Court's prior order in *Schmit-Lorenz v. Mid-Century Ins. Co.*, No. 00-345 (dated January 30, 2001).

¶5 Following Judge Macek's order, the Union filed a motion to reinstate Judge Johnson's order and the City filed a motion to remand this case back to the Department of Labor for additional evidence on the unit clarification clause issue. On June 4, 2001, Judge Macek denied the Union's motion and granted the City's motion.

¶6 The Union next petitioned this Court for supervisory control pursuant to Rule 17, M.R.App.P. It contended that supervisory control is necessary because the District Court erred as a matter of law and its error will force the parties to incur the expense of a needless cycle of trial, appeal and retrial. For its contention that this Court should accept supervisory

control, it relies on our decision in *Plumb v. Fourth Judicial Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1011, where we held that supervisory control should issue to correct a mistake of law where there is no plain, speedy or adequate remedy at law. We conclude that based on our decision in *Plumb* and those authorities cited in the Petitioner's brief, this is an appropriate case in which to exercise supervisory control.

DISCUSSION

¶7 Did the District Court err when it struck Judge Johnson's order affirming the decision of the Department of Labor, Board of Personnel Appeals?

¶8 The Union contends that Judge Macek misconstrued our order in *Schmit-Lorenz* because, by its terms, it did not apply to an oral pronouncement of a formerly-presiding judge and that the facts in *Schmit-Lorenz* which involved summary judgment are distinguishable from the facts in this case based on its procedural history. Finally, the Union contends that *Schmit-Lorenz* was incorrectly decided and is an inadequate basis for the action taken by the District Court. It contends that every act which was within Judge Johnson's power was performed during her term of office and that the ministerial function of filing Judge Johnson's order was the responsibility of the Clerk of Court pursuant to § 3-5-501(1)(d), MCA. According to the Union, the Clerk of Court, Nancy Morton, had full authority to perform that function when the order in this case was filed on January 3, 2001.

¶9 In response, the City of Great Falls contends that the issues raised by the Union's petition are moot because, in the course of administrative reorganization, the Battalion Chief

position has been eliminated. Alternatively, the City contends that Judge Johnson's order was ineffective because it was not filed until after her term of office expired.

¶10 We observe that whether the Battalion Chief position has been legally eliminated is the subject of an Unfair Labor Practices Act claim filed by the Union with the Board of Personnel Appeals and that the outcome of that claim is dependent to some extent on the validity of Judge Johnson's order affirming the Board's original decision. Therefore, the City's argument regarding mootness is circular and not well taken.

¶11 We limit our consideration in this case to the issue of whether Judge Johnson's order signed on December 30, 2000, during the legal term of her office was binding on the parties even though not filed with the Clerk of Court until January 3, 2001, after the expiration of Judge Johnson's term of office.

¶12 The states generally recognize that judgments undergo three phases of final development: 1) rendition; 2) reduction to writing; and 3) entry. However, states vary in their determination of the stage at which judgments bind the parties before the court.

¶13 The Court of Appeals of Texas has held that a judgment is "rendered" when the matter submitted to it for adjudication is officially announced either orally in open court or by memorandum filed with the clerk. *In re Marriage of Wilburn* (Tex. App. 2000), 18 S.W.3d 837, 840. Further, the judgment becomes effective once it is rendered. *General Elec. Capital Auto Fin. Leasing Servs., Inc. v. Stanfield*, No. 12-00-00367-CV, 2001 WL 800058, at *2 (Tex. App. July 11, 2001). The entry of judgment is simply the ministerial act which

furnishes enduring evidence of the judicial act of rendition. *State v. Macias* (Tex. App. 1990), 791 S.W.2d 325, 329. Thus, a written judgment signed by the trial judge is not a prerequisite to the finality of a judgment. *Wilburn*, 18 S.W.3d at 841.

¶14 California appears to follow the same line of reasoning. In *Bank One Texas v. Pollack* (Cal. Ct. App. 1994), 29 Cal.Rptr.2d 510, 512, the California court stated:

The rendition of a judgment is a judicial act, and a judgment thus has full force and effect once it has been rendered, regardless of whether it has been entered. Entry simply provides record evidence of a judgment. [Citations omitted.]

¶15 These authorities are cited for the general principle articulated and not based on the similarity of their facts to those in this case.

¶16 For purposes of commencing time periods, it appears that a majority of states require that a judgment or order be entered or filed to take effect. The prevailing concerns appear to be: 1) ensuring that the judgment is final and permanently evidenced through court record (*Davis v. Davis* (Md. 1994), 646 A.2d 365, 370); and 2) establishing a fixed date from which the time for appeal begins. For most of the states which share this position, the actual filing of the judgment or order in the clerk of court's office, in compliance with Rule 58 of the rules of civil procedure, constitutes the "entry of the judgment" for purposes of computing the time within which the notice of appeal must be filed. See *Holmes v. Powell* (Ala. 1978), 363 So.2d 760, 761. Once again, these cases are cited for their general principle and not for their factual similarity to this case.

¶17 Based on our review, the case most directly on point to the facts in this case is *Cirro*

Wrecking Co. v. Rappolo (Ill. 1992), 605 N.E.2d 544. There the Illinois Supreme Court concluded that:

[W]here the trial judge requires the submission of a form of written judgment to be signed by him, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed with the clerk. Until that time, the judgment remains pending and subject to the trial judge's revisions. The actual entry of the judgment by the clerk, however, is but a ministerial function and does not affect the validity of the judgment. Thus, a judgment otherwise properly rendered during the pendency of a judge's term is valid even though it is actually entered by the clerk following the trial judge's vacation of office. That must be so because the judicial authority reposed in a trial judge in the proper functioning of his office in rendering judgment cannot be dependent upon the ministerial function of the court's clerk in recording that fact. It must also follow that, because the judicial authority is exercised exclusively by the trial judge during the pendency of his office, that authority ceases when the office is vacated. [Citations omitted.]

Cirro, 605 N.E.2d at 550.

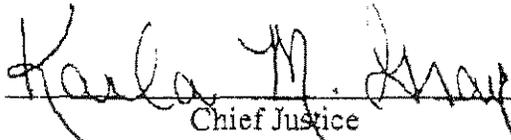
¶18 We agree with the Illinois Court that the filing of the district court's order is merely a ministerial function which in this case was performed by a duly authorized clerk of court. The judgment in this case was otherwise properly rendered by Judge Johnson during the pendency of her term and was binding on the parties at that point even though entered by the clerk following her vacation of office. We also conclude, however, that for purposes of commencing time periods, judgments shall continue to take effect from the date on which they are filed with the clerk of court so that a fixed date is established and known to the parties.

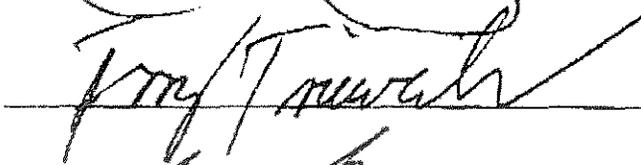
¶19 For these reasons, we accept supervisory control over the District Court for the Eighth Judicial District, the Honorable Julie Macek, presiding, and reverse the order of the District

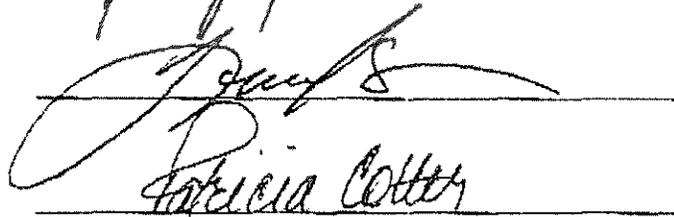
Court which set aside the order of the Honorable Marge Johnson, dated December 30, 2000, which affirmed the decision of the Department of Labor, Board of Personnel Appeals. We decline to address the remaining issues presented by the Union's petition for supervisory control assuming that their disposition will be reconsidered following the reinstatement of Judge Johnson's order and consideration of the procedural effect that follows from its finality.

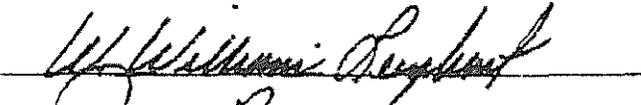
¶20 To the extent that our prior unreported order in *Schmit-Lorenz* is inconsistent with this decision, it should not be relied upon to resolve the rights of other litigants.

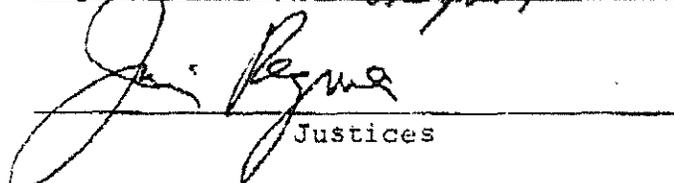
Dated this 31st day of January, 2002.


Kara M. Gray
Chief Justice




Patricia Cotter

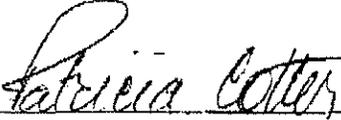



Justices

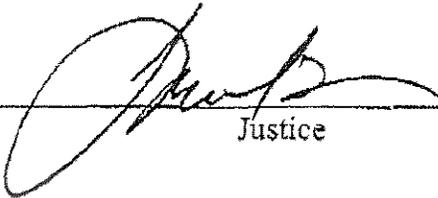
Justice Jim Rice did not participate in this matter.

Justice Patricia O. Cotter specially concurs.

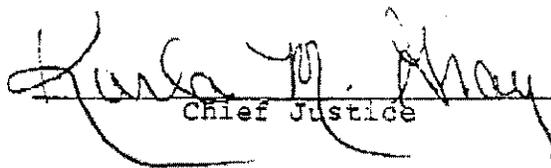
¶ 21 I concur in the result reached by the majority. I write separately to state that we appreciate that Judge Macek acted appropriately in initially resolving this matter in reliance upon the Order issued in *Schmit-Lorenz*. We regret the additional workload assumed by Judge Macek, who was charged with rehearing dozens of matters, all as a result of the *Schmit-Lorenz* Order. However, I believe the result reached here is the better reasoned response to the unique question of whether an Order executed prior to the conclusion of a judge's term, but filed after the conclusion of that term, is valid and effective.


Justice

Justice James C. Nelson joins in the foregoing concurrence.


Justice

Chief Justice Karla M. Gray joins in the foregoing concurrence.


Chief Justice