

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
LEGAL SERVICES DIVISION
HEARINGS UNIT

IN THE MATTER OF UNIT CLARIFICATION 9-94:

STATE OF MONTANA,)
DEPARTMENT OF JUSTICE,)
)
Petitioner,)
)
vs.)
)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
)
Respondent.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

In the unit clarification petition of August 3, 1994, the State of Montana, Department of Justice, proposed clarification of an existing bargaining unit comprised of "...all full-time and part-time (20 hours plus per week) clerks...excluding supervisory and managerial personnel." The petitioner proposed the exclusion of three positions based on newly-assigned supervisory duties. Those positions are numbered 12600, 12735, and 12610, and are currently filled by Joyce Talbott, Fran Condon and Nick Anderson, respectively. The Montana Public Employees Association disagreed with the Employer's unit clarification petition, and the matter subsequently proceeded to hearing.

As agreed to by the parties, a hearing in the above-entitled matter was held on January 19, 1995, in the Walt Sullivan Building, 1327 Lockey, Helena, Montana, before Gordon D. Bruce, Hearing Officer. The Petitioner, State of Montana, Department of Justice,

1 was represented by Paula Stoll. The Respondent, Montana Public
2 Employees Association, was represented by Carter Picotte. Section
3 Supervisor, Justina Fyfe, was called as a witness and gave sworn
4 testimony. Joint Exhibits J-1 through J-7 were admitted into the
5 record without objection as were Exhibits numbered A through I.

6 Upon completion of the hearing, the parties agreed to the
7 mutual and simultaneous exchange of post-hearing briefs on March 1,
8 1995.

9 II. ISSUE

10 The primary issue in this petition for unit clarification is
11 whether Positions 12600 (Joyce Talbott, hereafter Talbott,
12 incumbent), 12735 (Fran Condon, hereafter Condon, incumbent), and
13 12610 (Nick Anderson, hereafter Anderson, incumbent) should be
14 excluded from the bargaining unit based on their supervisory
15 responsibilities.

16 III. FINDINGS OF FACT

17 1. The three positions at issue are employed in the Driver
18 Control Section of the Motor Vehicle Division, Department of
19 Justice. Justina Fyfe supervises the Driver Control Section.
20 Talbott, Condon and Anderson report directly to Fyfe and are each
21 responsible for overseeing the work of a specialized unit
22 (Petitioner's Exhibit A). Prior to June, 1994, these individuals
23 served as unit leadworkers. Their supervisory responsibilities
24 were expanded in June, 1994, to alleviate the workload of Fyfe's
25 position.

26 2. The positions held by Talbott, Condon and Anderson are
27 designated and referred to as "unit supervisor." These positions
28 are each responsible for a work unit--Reinstatement Unit, DUI/BAC

1 and Medical Unit, respectively. Each represents a specific area of
2 operation within the Driver's Control Section which is under the
3 overall supervision of Section supervisor Fyfe. (Exhibits A, B, C,
4 D, E, F, G, H and I)

5 3. Subordinate employees in the above mentioned work units
6 understand that in their respective positions, Talbott, Condon or
7 Anderson are their immediate supervisors and these workers look
8 upon the unit supervisors as having essentially the same
9 supervisory authority as Fyfe. (Testimony Fyfe who is reliable and
10 credible in all her testimony)

11 4. When vacancies occur within their respective units, a
12 unit supervisor serves on a three-member hiring panel. This panel
13 includes Fyfe and a representative from outside the section. Each
14 member independently scores applications and structured interview
15 responses. The hiring panel then develops a consensus choice and
16 recommends one applicant for hire. The unit supervisor's
17 recommendation is given weight equal to that of the other two panel
18 members. Although Dean Roberts, the division administrator,
19 retains final hiring authority, he has always authorized the hire
20 of the applicant recommended through this three-member panel
21 approach. (Testimony of Fyfe and Petitioner's Exhibits E, F, G, H
22 and I)

23 5. Additionally, the unit supervisors identify, develop and
24 conduct all the necessary training of employees within their
25 respective work unit. This includes orientation, initial job
26 training, and on-going training as it relates to changes in law,
27 departmental policy and procedure. (Testimony of Fyfe and
28 Petitioner's Exhibits E, F and G)

1 6. Further, the work of each unit is assigned by specialty
2 of each desk. The unit supervisors review, inspect and monitor
3 unit work. When fluctuations in work load occur, the unit
4 supervisors independently determine how the duties should be
5 reassigned. (Testimony of Fyfe and Exhibits E, F and G)

6 7. All employees in the Drivers Control Section work
7 standard hours (8 a.m.- 5 p.m., Monday through Friday). The unit
8 supervisors, however, also have the discretionary authority to
9 approve or deny any variations, such as flex time, annual leave, or
10 planned sick leave. They also independently observe and appraise
11 the performance of employees in their units and communicate their
12 evaluations to Fyfe. Fyfe in turn produces the final written
13 performance appraisals. (Testimony of Fyfe and Exhibits B, E, F
14 and G)

15 8. The unit supervisors sign and certify the timesheets of
16 employees within their respective work units. Their signatures
17 appear in the area marked "supervisor's certification." (Exhibits
18 B, C, and D)

19 9. The unit supervisors counsel employees within the work
20 unit and recommend formal disciplinary action, if necessary. Fyfe
21 recalled two occasions since June where formal disciplinary action
22 had been taken. In each instance, she followed the recommendation
23 of the unit supervisor. Furthermore, the unit supervisors are the
24 first contact for employees in the grievance procedure. (Testimony
25 of Fyfe and Exhibits E, F and G)

26 10. The unit supervisors are each paid a grade above the
27 workers in their units. The change in pay grade resulted from the
28 increased supervisory authority given these positions in June, 1994

1 and as reflected in the respective position descriptions.
2 (Testimony of Fyfe and Exhibits E, F and G)

3 IV. CONCLUSIONS OF LAW

4 A. Supervisory Exclusions

5 1. Montana law, at 39-31-103 (c), MCA, excludes all
6 supervisory employees from coverage by the Collective Bargaining
7 for Public Employees law. It defines a "supervisory employee" as:

8 ... any individual having authority in the interest of
9 the employer to hire, transfer, suspend, lay-off, recall,
10 promote, discharge, assign, reward, discipline other
11 employees, having responsibility to direct them, to
12 adjust their grievances, or effectively to recommend such
13 action in connection with the foregoing the exercise of
14 such authority is not of a merely routine or clerical
15 nature that requires the use of independent judgment.

13 The definition of a supervisory employee found in the Montana
14 statute closely resembles that found in the National Labor Relations
15 Act. 29 U.S.C. Section 152(11)

16 2. Thus, in determining supervisory status, the Montana
17 Board of Personnel Appeals (Board) has historically followed the
18 National Labor Relations Board (NLRB) and federal court precedent
19 (**State ex. rel. Board of Personnel Appeals v. District Court**, 183
20 Mont. 233 (1977) 598 P.2d 1117, 103 LRRM 2297; **Teamsters Local No.**
21 **45 v. State ex. rel. Board of Personnel Appeals**, 195 Mont. 272
22 (1981), 635 P.2d 1310, 110 LRRM 2012; **City of Great Falls v. Young**
23 **(III)**, 683 P.2d 185 (1984), 119 LRRM 2682).

24 3. In its rulings the NLRB has held that, to be classified
25 as a supervisor, a person need not meet all of the criteria listed
26 in the act. In fact, the existence of any one of those criteria is
27 sufficient to confer supervisory status, regardless of how
28 frequently it is performed [**George C. Foss Company v. NLRB**, 752

1 F.2d 1407, 118 LRRM 2746, CA9 (1985)]. And, in **Walla Walla Union-**
2 **Bulletin vs. NLRB**, 631 F.2d 609, 613 (9th Cir.1980), the court held
3 that the existence or exercise of any one of the enumerated powers
4 combined with "independent judgment" is sufficient to confer
5 supervisory status, *regardless of how seldom or often* the power is
6 exercised.

7 4. Moreover, like the NLRB, the Montana board considers so-
8 called secondary indicia in determining whether an employee is a
9 supervisor (**Montana Federation of State Employees vs. Montana**
10 **Developmental Center**, Unit Determination 6-88). In Unit
11 Determination 6-88, as in the present case, other important
12 functions set the unit supervisors apart from their fellow
13 employees. Among the factors that have been regarded as weighing
14 in favor of supervisory status are the following:

15 (1) the employee being designated a supervisor; (2) the
16 fact that he is regarded by himself or others as a
17 supervisor; (3) the exercise of privileges accorded only
18 to supervisors; (4) attendance at instructional sessions
19 or meetings held for supervisory personnel; (5)
20 responsibility for a shift or phases or of operations;
21 (6) authority to interpret or transmit employer's
instructions to other employees; (7) the responsibility
for inspecting the work of others; (8) instruction of
other employees; (9) authority to grant or deny leave of
absence to others; (10) responsibility for reporting rule
infractions and keeping of time records on other
employees...

22 [Also see **Allen-Morrison Sign Co.** 79 NLRB 903, 22 LRRM 1451 (1948)]

23 5. And, while it is true that the unit supervisors in the
24 present case do not have the final authority to discharge or
25 promote, these characteristics cannot be looked at in isolation as
26 encouraged by Respondent. Courts have held that it is the
27 relationship of the evaluation and disciplinary role to the whole
28 organization that is important [**ITT Lighting Fixtures v. NLRB**, 712

1 F.2d 40, 45, 114 LRRM 2758 (7th Cir. 1981)]. Here, the unit
2 supervisors exercised independent judgment as they rendered
3 meaningful disciplinary and evaluative functions; therefore,
4 Respondent's contentions must be rejected.

5 6. Clearly, a determination of whether the supervisory
6 responsibilities assigned to these employees are routine and
7 clerical and carried out with or without independence requires more
8 than a showing that a superior reviews the results of supervisory
9 actions. Here, the unit supervisors have a significant and
10 substantial involvement as indicated by the following "tests"
11 utilized in identifying supervisors.

12 B. Driver Control Unit Supervisors

13 7. The record clearly reflects that the positions held by
14 Talbott, Condon and Anderson meet a sufficient number of criteria
15 to be designated as supervisors and to be excluded from the
16 bargaining unit. The three positions meet several of the primary
17 twelve tests of a supervisory employee, either directly or through
18 "significant and substantial involvement," and they meet all but a
19 few of the secondary tests.

20 The Twelve Tests -- The record establishes that Talbott,
21 Condon, and Anderson each train unit subordinates, assign work to
22 unit subordinates, review work performed by unit subordinates,
23 direct unit subordinates in the performance of that work, and
24 initiate corrective action when the work is not done correctly.
25 The record further establishes that each of these individuals
26 perform these duties using independent judgment and discretion.

27 Although the unit supervisors do not have the authority to
28 hire and fire employees without review, this factor alone, as

1 before mentioned, is not dispositive of the issue whether these
2 employees were supervisors. More importantly, the record
3 establishes that the unit supervisors' role in hiring and
4 disciplining subordinate employees appears comparable to that of
5 the Section Supervisor, Justina Fyfe. Here, the unit supervisors'
6 recommendations are given weight equal to the other two members on
7 the panel, and the panel's recommendation is seldom if ever
8 contradicted by the administrator's final decision.

9 Additionally, their involvement in initiating discipline is
10 characteristic of first-line supervisors throughout state
11 government (Unit Clarification 9-88, supra). And, the record
12 reflects that Talbott, Condon and Anderson are given authority to
13 initiate informal disciplinary measures. When those measures fail,
14 their recommendations for formal disciplinary actions are given
15 significant weight.

16 The Secondary Tests -- The record establishes that Talbott,
17 Condon, and Anderson oversee the work of specialized work units.
18 In addition to the responsibilities mentioned above, the record
19 established that these individuals approve and deny leave requests
20 for unit subordinates, maintain and certify time records for each
21 of the employees, and are paid more than unit subordinates based on
22 their supervisory duties. Again, the record establishes that these
23 individuals are solely responsible for the performance of duties.
24 Their involvement requires the use of independent judgement. It is
25 far more than routine or clerical in nature.

26 8. Notwithstanding the fact that these unit supervisors do
27 not have final authority, and that there appears to be a
28 disproportionate number of supervisors in the Driver Control

1 Section, the relevant consideration is effective recommendation or
2 control rather than final authority. Furthermore, even though
3 these unit supervisors may spend a substantial portion of their
4 time in production work, consistent with the concern for divided
5 loyalty, the NLRB has ruled in similar cases that such workers
6 should be excluded from the bargaining unit if they have
7 considerable authority over the employees under them. [**Operating**
8 **Engineers, Local 478**, 283 NLRB No. 114, 125 LRRM 1068, (1987)]

9 9. Clearly, the unit supervisors in question possess most of
10 the primary and secondary "authorities" as shown above, and the
11 Petitioner has met its burden of proof in this matter. Moreover,
12 this result appears consistent with the underlying policies of the
13 NLRB and the Board pursuant to the following:

14 [The] exclusion of supervisors from the protections
15 of the Act and from bargaining units was designed
16 in part to protect employees from supervisor
17 influence within the union's organization. If
18 supervisors were members of and active in the union
19 which represented the employees they supervised, it
20 could be possible for the supervisors to obtain and
21 retain positions of power in the union by reason of
22 their authority over their fellow union members
23 while working on the job. [**Local 636, United**
24 **Association of Journeymen and Apprentices of the**
25 **Plumbing and Pipe Fitting Industry of the United**
26 **States and Canada**, 287 F.2d 354, 360-361, 47 LRRM
27 2457 (D.C. Cir. 1961)]

28 V. **RECOMMENDED ORDER**

29 The bargaining unit at the Department of Justice, Motor
30 Vehicle Division, which is represented by the Montana Public
31 Employees Association is hereinafter modified to exclude Positions
32 12600, 12735, and 12610, currently filled by Joyce Talbott, Fran
33 Condon and Nick Anderson, respectively.

* * * * *

