

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

IN THE MATTER OF UNIT CLARIFICATION NO. 1-96:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
CITY OF LEWISTOWN,)
)
Respondent.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION:

On August 14, 1995, Montana Public Employees Association (Petitioner) filed a Unit Clarification seeking inclusion in the City of Lewistown Bargaining Unit of a newly created position of Superintendent of Operations. The City of Lewistown (Respondent) contends the position is supervisory, they have the right to create the supervisory position under the management rights provisions of the collective bargaining agreement and the position is statutorily precluded from unit inclusion because the position is "supervisory" as defined in Section 39-31-103(11), MCA.

A hearing was conducted in this matter in Lewistown, Montana on December 4, 1995. Parties present, duly sworn, and offering testimony included: James Petranek, Mark Langdorf, Eddy Awbery, Anthony Sweeney, Charles Jones, James Mahrer, Tim Fry, Bill Shaw and Mike Peck. The Petitioner was represented by Counsel Carter Picotte and the Respondent by Counsel Monte Boettger. Documents admitted into the record without objection included Petitioner Exhibits A through K and Respondent Exhibits 1 through 9.

1 Respondent's Exhibits 10 and 11 were admitted over Petitioner's
2 relevancy objection. The documents related to a grievance which
3 involved the position which is the subject of this unit
4 clarification. On December 27, 1995, in a conference call, the
5 parties agreed to waive opportunity for post hearing submissions
6 and requested a recommended order based upon the hearing record.

7 **II. FINDING OF FACT:**

8 1. Following several staffing changes, duties, formally
9 conducted in large part by the City of Lewistown's Director of
10 Public Works, were identified for a newly created position of
11 Superintendent of Operations. The Respondent had considered
12 creation of this position in 1993 and developed a position
13 description (Exhibit J) describing the position work
14 responsibilities. The position was not filled at that time.

15 2. In May, 1995, a new position description (Exhibit 3) was
16 developed. Following position announcement and applicant
17 consideration, Mr. Mike Peck was selected on or about July 1, 1995
18 for the position of Superintendent of Operations. The union
19 representative had thought the position as identified in the 1993
20 job description was a working foreman and included in the
21 bargaining unit. When the position was again considered and filled
22 in 1995 the union representative continued to feel the position was
23 a working foreman and because contract negotiations had all ready
24 concluded he did not have the opportunity or reason to discuss the
25 position during contract negotiations.

26 3. The parties agreed the position description (Exhibit 3)
27 accurately describes the work responsibilities of the
28 Superintendent of Operations. The duties, in part, include:

1 reviews jobs, assigns staff and equipment;
2 reviews subordinate staff work;
3 record, review and initially authorize time cards;
4 work with subordinate staff as needed;
5 inspect work equipment;
6 maintain tool, equipment, and material inventory;
7 implement, and train staff in safety program;
8 inspect, locate, and plan street, and water department
9 repairs;
10 resolve grievances at Step 1 if possible, and/or advance
11 unresolved grievances to step 2;
12 evaluate subordinate staff work performance, and
13 prepare preliminary budget.

14 4. The Superintendent of Operations supervises four to six
15 street department staff and two water department staff. On
16 occasions, when additional city staff are needed temporarily in the
17 street or water department for a rush or large project, other city
18 employees may be temporarily assigned to the Superintendent of
19 Operations. The Superintendent of Operations may also direct a
20 subordinate staff to temporarily work for some other city
21 department if a special circumstance requires such action. The
22 Superintendent can not independently, permanently transfer any
23 subordinate staff. Such action would require action by the City
24 Commission.

25 5. The Superintendent of Operations initially, for a month
26 or two, after beginning the position of Superintendent, spent about
27 80% of his work hours in the field working with his staff. He had
28 been in a personal construction business for several years and is
able to operate most machinery used by his staff. Both he and his
supervisor, the Director of Public Works, feel a supervisor needs
initially to work personally with staff to understand work
responsibilities and projects as well as individual staff and
equipment capabilities and needs. The Superintendent estimated
that in the future only about 20% of his time will be spent

1 actually working with the staff and the remaining 80% will be used
2 in budgeting, planning, evaluating and other supervisory functions.

3 6. The Superintendent, in preparation for staff evaluations,
4 prepared a "Job Performance Evaluation" outline he will use when
5 appraising his subordinate staff. (Exhibit 6)

6 7. Article II, the Recognition Clause of the Collective
7 Bargaining Agreement, identifies the unit as follows:

8 Section 1: The Employer recognizes the Association as the
9 sole and exclusive bargaining agent for employees of the City
10 of Lewistown, Montana of the following Departments: Police
11 Department, Public Works Department, Sewage Disposal Plant,
12 City Office, City Library, and Recreation Department and
13 including but not limited to job titles of Police Captain,
Police Patrolmen, Police Sergeant, Clerk-Meter Attendant,
Clerk-Dispatcher, Street Worker, Operator, Utility Worker,
Librarian, Plant Operator, Animal Control Officer, and all
other non-management employees of the aforementioned
Departments.

14 Section 2: Exclusions include all Supervisors such as Police
15 Chief, Assistant Police chief, City Clerk, City Treasurer,
16 Recreation Department Director, Library Director, Public Works
17 Director, Treatment Plant Laboratory Administrator, and
Treatment Plant Chief Operator, Firemen, Ambulance Attendants,
City County Planning Department and Swimming Pool Department.

18 8. A supervisor is defined as follows in Section 39-31-
19 103(11), MCA, of the Collective Bargaining for Public Employees
20 Act:

21 (11) "Supervisory employee" means any individual having
22 authority in the interest of the employer to hire, transfer,
23 suspend, lay off, recall, promote, discharge, assign, reward,
24 discipline other employees, having responsibility to direct
25 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.

26 8. Section 39-31-103(10), MCA, identifies "A Public
27 Employer" as follows:

28 (10) "Public employer" means the state of Montana or any
political subdivision thereof, including but not limited to

1 any town, city, county, district, school board, board of
2 regents, public and quasi-public corporation, housing
3 authority or other authority established by law, and any
4 representative or agent designated by the public employer to
act in its interest in dealing with public employees. Public
employer also includes any local public agency designated as
a head start agency as provided in 42 U.S.C. 9836.

5 **III. CONCLUSIONS OF LAW:**

6 1. The Board of Personnel Appeals has jurisdiction in this
7 matter pursuant to Section 39-31-202, MCA. Billings, Montana v.
8 Fire Fighters Local No. 521, 113 LRRM 3324, 651 P.2d 627, 39
9 St.Rep. 1844 (1982). The Court has approved the practice of the
10 Board of Personnel Appeals in using Federal Court and National
11 Labor Relations Board (NLRB) precedent as guidelines for
12 interpreting the Montana Collective Bargaining for Public Employees
13 Act as the State Act is similar to the Federal Labor Management
14 Relations Act. State ex. rel. Board of Personnel Appeals v.
15 District Court, 183 Mont. 223 (1977) 598 P.2d 1117, 103 LRRM 2297;
16 Teamsters Local No. 45 v. State ex. rel. Board of Personnel
17 Appeals, 195 Mont. 272 (1981), 635 P.2d 1301, 110 LRRM 2012; City
18 of Great Falls v. Young (III), 683 P.2d 185 (1984), 119 LRRM 2682.

19 2. Under Section 39-31-103(11) MCA, a "Supervisory employee"
20 is any employee who in the interest of the employer exercises
21 independent judgement which is not routine or clerical and involves
22 matters related to staff direction, grievance adjustment, work
23 assignment, transfer. The Superintendent does exercise independent
24 judgement in the interest of the city of Lewistown in many areas
25 which are identified for a person who is a supervisor. There are
26 many other actions for which an employee can be responsible which
27 also will result in that employee being found a "supervisor."
28 There is no dispute that the Superintendent does not independently

1 hire, fire, promote staff. Staff evaluations and his
2 recommendations relating to these areas are considered by his
3 supervisor and of the City Commission when staff changes are made
4 by the Commission members.

5 3. In addition to the areas of supervisory authority
6 exercised as identified in Section 39-31-103(11), MCA, the Board of
7 Personnel Appeals has identified some secondary tests for use in
8 determining whether a position is supervisory. The secondary tests
9 as identified in UD 6-88, Montana Federation of State Employees v.
10 Montana Developmental Center, State of Montana, (1988), are as
11 follows:

12 ...the employee being designated a supervisor;
13 the fact that he is regarded by himself and
14 others as a supervisor; the exercise of
15 privileges accorded only to supervisor;
16 attendance at instructional sessions or
17 meeting held for supervisory personnel;
18 responsibility for a shift or phases of
19 operations; authority to interpret or transmit
20 employer's instructions to other employees;
responsibilities for inspecting the work of
others; instruction of other employees;
authority to grant or deny leave of absence to
others; responsibility for reporting rule
infractions; keeping of time records on other
employees; receiving substantially greater pay
than other employees, not based solely on
skill and failure to receive overtime...

21 4. The record in this case shows the Superintendent makes
22 independent judgements in assigning staff and equipment. He also
23 exercises independent judgement in the interest of the employer
24 when he performs many of his duties like budget preparation, staff
25 evaluation, work inspection, staff training, and grievance
26 resolution efforts. Staff evaluations may be used, according to
27 City Policy (exhibit H pg. 29) "to evaluate employees for
28 promotion." The Superintendent regards himself as a supervisor and

1 is so recognized by his staff. He is responsible for street and
2 water department operation, has authority to interpret his
3 employer's instructions and keeps time records for his staff.

4 5. The totality of all of the factors as identified in the
5 law and by the Board lead to the conclusion that the Superintendent
6 is properly excluded from the unit. The directions he gives to
7 staff are not routine or clerical in nature.

8 6. The Superintendent falls within the definition of a
9 supervisory employee as identified in Section 39-31-103(11), MCA as
10 well as under the secondary tests identified by the Board and,
11 therefore, is excluded from the unit under application of the
12 Collective Bargaining Act for Public Employees.

13 V. RECOMMENDED ORDER:

14 IT IS ORDERED that in the matter of issue raised in unit
15 Clarification 1-96, the Superintendent of Operations is excluded
16 from the unit because he is a supervisor as defined in Section 39-
17 31-103 (11), MCA.

18 DATED this 22nd day of January, 1996.

19 BOARD OF PERSONNEL APPEALS

20
21 By: Joseph V. Maronick
22 Joseph V. Maronick
23 Hearing Officer
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1 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
2 shall become the Final Order of this Board unless written
3 exceptions are postmarked no later than February 14, 1996.
4 This time period includes the 20 days provided for in ARM
5 24.26.215, and the additional 3 days mandated by Rule 6(e),
6 M.R.Civ.P., as service of this Order is by mail.

7 The notice of appeal shall consist of a written appeal of the
8 decision of the hearing officer which sets forth the specific
9 errors of the hearing officer and the issues to be raised on
10 appeal. Notice of appeal must be mailed to:

11 Board of Personnel Appeals
12 Department of Labor and Industry
13 P.O. Box 6518
14 Helena, MT 59604

15 * * * * *

16 CERTIFICATE OF MAILING

17 The undersigned hereby certifies that true and correct copies
18 of the foregoing documents were, this day served upon the following
19 parties or such parties' attorneys of record by depositing the same
20 in the U.S. Mail, postage prepaid, and addressed as follows:

21 Monte Boettger
22 City Attorney
23 Montana Bldg Suite 207
24 Lewistown, MT 59457

25 Carter Picotte
26 Staff Attorney
27 Montana Public Employees Association
28 Po Box 5600
Helena, MT 59604

DATED this 22nd day of January, 1996.

Christine A Roland