

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNIT CLARIFICATION NO. 4-96:

STATE OF MONTANA DEPARTMENT OF)
HEALTH & HUMAN SERVICES, MONTANA)
DEVELOPMENTAL CENTER)
Petitioner)

vs.

AFSCME LOCAL NO. 971, MONTANA)
DEVELOPMENTAL CENTER, AMERICAN)
FEDERATION OF STATE, COUNTY &)
MUNICIPAL EMPLOYEES, AFL-CIO)
Respondent)

**FINAL ORDER
ON
PETITION FOR RECONSIDERATION:
REQUEST FOR
ORAL ARGUMENT**

The above-captioned matter came before the Board of Personnel Appeals for consideration of the Respondent's Petition for Reconsideration: Request for Oral Argument. The Respondent was represented Patrick McKittrick, and the Petitioner was represented by Vivian Hammill. The Board considered the matter based upon the briefs of the parties.

In reconsidering its prior decisions, the Board is guided by the following administrative rule:

24.26.711 BOARD'S RECONSIDERATION OF ITS DECISIONS

- (1) The following definitions apply to this rule:
 - (a) "Petition" means a petition for reconsideration.
 - (b) "Petitioner" means the party requesting reconsideration.
- (2) All petitions shall be filed within ten days of the mailing of the board's decision to the petitioner. The petitioner shall serve upon all parties a copy of the petition.
- (3) The filing of a petition is not a prerequisite for seeking judicial review of the board's final order.
- (4) A petition may be granted only upon the following grounds:
 - (a) Clerical error.
 - (b) To present relevant evidence of argument that proper procedures were not followed during the appeal to the board.
- (5) The petition must state the ground or grounds upon which reconsideration is sought and a detailed statement why the grounds will likely mandate a change in the board's decision.
- (6) The board shall rule on the petition at its next meeting and notify the parties of its decision.
- (7) A decision of the board denying a petition is a final order pursuant to sections 2-4-0623 and 2-4-702, MCA.

In reviewing the present petition, the Board does not believe that the present petition should be granted. In essence, the Respondent challenges for the first time, the authority of the Board to consider unit clarifications. That challenge is a legal challenge to the Board's prior decision. It is not alleged that there is a clerical error or procedural defect in the manner in which the matter previously came before the Board. This new legal jurisdictional issue is not one which was previously before the Board and it is not properly before the Board now under the auspices of a petition for reconsideration.

1 For the foregoing reason, the Board orders as follows:

2 1. **IT IS ORDERED** that the Petition for Reconsideration: Request for Oral
3 Argument is hereby denied.

4 DATED this 22 day of January, 1998.

5 **BOARD OF PERSONNEL APPEALS**

6 By: *James A. Rice, Jr.*
7 James A. Rice, Jr.
8 Presiding Officer

9 * * * * *
10 Board members Rice, Talcott, Hagan and Perkins concur.
11 Board member Schneider dissents.
12 * * * * *

13 * * * * *

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

18 * * * * *

19 **CERTIFICATE OF MAILING**

20 I, *Jennifer Jacobson*, do hereby certified that a
21 true and correct copy of this document was mailed to the following on the 26th day of
22 January, 1998:

23 D. PATRICK MCKITTRICK
24 MCKITTRICK LAW FIRM PC
25 PO BOX 1184
26 GREAT FALLS MT 59403-1184

27 VIVIAN V. HAMMILL
28 SPECIAL ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF ADMINISTRATION
ROOM 155 - MITCHELL BUILDING
HELENA MT 59620

TOM FOLEY
EXECUTIVE DIRECTOR
AFSCME MT COUNCIL NO. 9
PO BOX 5356
HELENA MT 59604-5356

* * * * *

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 4-96

STATE OF MONTANA, DEPARTMENT OF)
HEALTH & HUMAN SERVICES,)
MONTANA DEVELOPMENTAL CENTER)
Petitioner,)

vs.)
AFSCME LOCAL NO. 971, MONTANA)
DEVELOPMENTAL CENTER, AMERICAN)
FEDERATION OF STATE, COUNTY &)
MUNICIPAL EMPLOYEES, AFL-CIO)
Respondent.)

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on September 18, 1997. Michael J. Bentley filed Respondents Exceptions to the Findings of Fact; Conclusion of Law; and Recommended Order issued by the hearing officer on June 19, 1997. Appearing before the Board were Thomas G. Foley representing the Respondent and Vivian V. Hammill and Bill Bentley, representing the Petitioner. All appearances were in person.

The present matter is one involving four food service supervisor positions and twenty-four cottage shift managers. The Petitioner maintains that the food service supervisors and cottage shift managers are properly classified as supervisory employees and excluded from the union. The Respondents assert that the food service supervisors and cottage shift managers do not meet the definition of supervisory employee as provided in Section 39-31-103(11), MCA, and therefore should be part of the union.

After review of the record and consideration of the arguments by the parties, the Board concludes that the record supports the decision of the hearing officer. The duties of the positions in question do appear to be supervisory in nature. Duties such as conducting performance evaluations and having to respond to grievances are certainly consistent with those of supervisory personnel. In addition, the Board is unable to ascertain that the hearing officer erred in his findings of fact. Once those facts are applied to the law, the proper conclusion was reached.

The hearing officer did mistakenly refer to the union as "Montana Council 971" when it should read Montana Council Number 9, Local 971. That mistake amounts to a typographical error and does not affect the substantive portions of the decision. Accordingly, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the Board adopts the Findings of Fact, Conclusion of Law, and Order issued by the hearing officer except that reference to Montana Council 971 is incorrect and should refer to Montana Council Number 9, Local 971.

2. **IT IS FURTHER ORDERED** that the appeal is dismissed.

1 DATED this 6 day of November, 1997.

2 BOARD OF PERSONNEL APPEALS

3
4 By: James A. Rice, Jr.
5 James A. Rice, Jr.
6 Presiding Officer

7 * * * * *

8 Board members Rice, Hagan, Talcott and Perkins concur.

9 Board member Schneider dissents.

10 * * * * *

11 * * * * *

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

16 * * * * *

17 CERTIFICATE OF MAILING

18 I, Jennifer Jacobson, do hereby certified that a
19 true and correct copy of this document was mailed to the following on the 7th day of
20 November, 1997:

21 THOMAS G. FOLEY, EXECUTIVE DIRECTOR
22 MT. COUNCIL NO. 9, AFSCME, AFL-CIO
23 PO BOX 5356
24 HELENA MT 59604-5356

25 VIVIAN V. HAMMILL
26 SPECIAL ASSISTANT ATTORNEY GENERAL
27 DEPARTMENT OF ADMINISTRATION
28 ROOM 155 - MITCHELL BUILDING
HELENA MT 59624

* * * * *

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

IN THE MATTER OF UNIT CLARIFICATION NO. 4-96:

STATE OF MONTANA, DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
MONTANA DEVELOPMENTAL CENTER,)

Petitioner,)

vs.)

AFSCME LOCAL 971, MONTANA)
DEVELOPMENTAL CENTER, AMERICAN)
FEDERATION OF STATE, COUNTY,)
AND MUNICIPAL EMPLOYEES,)
AFL-CIO,)

Respondent.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A formal hearing in the above entitled matter was conducted on August 28, 1996, at the Montana Developmental Center, Boulder, Montana. The hearing was conducted under authority of Section 39-31-207, MCA, pursuant to ARM 24.26.630, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, part 6, MCA. Petitioner, State of Montana, Department of Health and Human Services, Montana Developmental Center was represented by Bill Bentley, Labor Relations Specialist, Labor Relations Bureau, State Personnel Division, Department of Administration. Petitioner's Exhibits Nos. 1 through 32 were entered in the record. Witnesses appearing for Petitioner included Jennifer Pryor, Superintendent; David Anderson, Personnel Officer; Janis Zohner, Tray Line Supervisor; Marlene Kroll, Dietician; Barbara McMahon, Shift Manager; Tana Wing, Shift Manager; and Alan Giulio, Food Service Supervisor. Respondent, AFSCME Local 971, Montana Developmental

1 Center, American Federation of State, County, and Municipal
2 Employees, AFL-CIO, was represented by Tom Foley, Field
3 Representative, Montana Council No. 9, AFSCME, AFL-CIO.
4 Respondent's Exhibits Nos. A through S were entered in the record.
5 Witnesses appearing for Respondent included Bill Ryan, Cottage
6 Shift Manager; and Bill Kraus, Cottage Shift Manager. The parties
7 submitted post-hearing briefs in accordance with a stipulated
8 briefing schedule.

9 **II. ISSUE**

10 The issue in this matter is to determine whether four Food
11 Service Supervisor positions (Nos. 51182, 51183, 51184, and 51203)
12 and 24 Cottage Shift Managers positions should be properly excluded
13 from the existing bargaining unit based upon supervisory duties
14 pursuant to Section 39-31-103(11), MCA.

15 **III. FINDINGS OF FACT¹**

16 1. Petitioner filed a petition for unit clarification with
17 the Board of Personnel Appeals (Board) on December 5, 1995. The
18 petition requested clarification of an American Federation of
19 State, County and Municipal Employees bargaining unit at the
20 Montana Developmental Center which covered positions including but
21 not limited to: rehabilitation aides, transportation officers,
22

23 ¹All proposed findings, conclusions and supporting arguments
24 of the parties have been considered. To the extent that the
25 proposed findings and conclusions submitted by the parties, and
26 the arguments made by them, are in accordance with the findings,
27 conclusions and views stated herein, they have been accepted, and
28 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 stock clerks, cooks, custodians, food service workers, food service
2 supervisors, resident care aides, resident care aides or cottage
3 shift supervisors, licensed practical nurses, physical therapy
4 technicians, teacher aides, grounds keepers, maintenance workers,
5 and warehouse workers. The petition sought to clarify the unit by
6 excluding four (4) food service supervisor positions and twenty-
7 four (24) cottage shift manager positions from the bargaining unit.

8 2. Montana Developmental Center is a residential and
9 training facility for profoundly and developmentally disabled
10 individuals. The residents of MDC are housed in approximately
11 seven (7) residences. The resident care aides staff are the
12 primary direct care staff of the facility.

13 3. There are four Food Service Supervisor positions and
14 twenty-four Cottage Shift Manager positions. The Food Service
15 Supervisor positions have working titles of: Rotating Supervisor,
16 Tray Line Supervisor, Late Shift Supervisor and Production
17 Supervisor. All are assigned to the Facility Support Services
18 Bureau and with the exception of the Tray Line Supervisor position,
19 all work under the direction of the Food Service Manager. The Tray
20 Line Supervisor works under the supervision of the Clinical
21 Dietician. The Cottage Shift Managers are divided into two
22 categories. One category consists of three Shift Managers who are
23 Licensed Practical Nurses and work in the Health Care Unit. The
24 remainder of the Shift Managers are not LPNs and work in the
25 Residential and Resource Unit.

26 4. The Food Service Supervisor positions and the Cottage
27 Shift Manager positions were reclassified due to campus
28 reorganization and the assessed need for more supervision. The

1 positions were upgraded due largely in part to the additional line
2 supervisory duties the positions were assigned. The Food Service
3 Supervisor positions assumed their new positions in approximately
4 October 1995 and the Cottage Shift Manager positions assumed their
5 new positions on June 1, 1996.

6 5. All incumbents of the positions at issue received
7 additional training that addressed their additional supervisory
8 duties. Training was provided by the Department of Administration,
9 Department of Public Health and Human Services and Montana
10 Developmental Center. Training consisted of information on Family
11 Medical Leave Act, sexual harassment, grievance handling, workers'
12 compensation claims management, investigation techniques and leave
13 administration. Only supervisors attended this training and the
14 training was not offered to, or attended by, any of the staff that
15 the positions at issue supervise.

16 6. The Tray Line Supervisor is a grade 12 and supervises six
17 grade 6 Food Service Workers. The entry salary of a grade 12 is
18 \$10.124 an hour while the entry salary for a grade 6 is \$6.244 an
19 hour. The Rotating Supervisor, Production Supervisor, and Late
20 Shift Supervisor are all Grade 13. Grade 13 entry salary is
21 \$11.001 per hour. The Rotating Supervisor oversees one grade 5
22 Intermittent Food Service Worker, and three grade 6 Food Service
23 Driver/Aides. The Production Supervisor oversees one grade 6 Food
24 Service Worker and two grade 8 cooks. The Late Shift Supervisor
25 oversees one grade 6 Food Service Worker, three grade 5 Food
26 Service Workers, and one grade 7 Custodian.

27 7. The Cottage Shift Managers assigned to the Health Care
28 Unit (position nos. 51826, 51827, and 51828) are grade 13 and

1 supervise eight to nine grade 8 Resident Care Aides and one grade
2 6 Laundry Worker. The remaining Cottage Shift Managers are grade
3 12 and supervise four to eight Resident Care Aides which are
4 classified at either grade 7 or grade 8. The entry salary for a
5 grade 7 is \$6.746 per hour and the entry salary for a grade 8 is
6 \$7.312 per hour.

7 8. The Cottage Shift Managers and the Food Service
8 Supervisors approve and deny leave requests by their subordinates;
9 they approve time keeping logs; and they conduct performance
10 appraisals. They have the responsibilities to train employees and
11 direct them in their work. They also assign subordinates to work
12 stations or work duties.

13 9. The Cottage Shift Managers and Food Service Supervisors
14 maintain supervisor notes and have authority to discipline
15 subordinate employees to include recommendation of suspension or
16 discharge. Affected Cottage Shift Managers or Food Service
17 Supervisors sit on a panel when hiring new employees. The hiring
18 panel is provided with a ranking of the applicants that is based
19 upon qualifications, capabilities and seniority. However, the
20 Cottage Shift Manager or Food Service Supervisor retains the
21 authority to approve or disapprove the hiring of any applicant
22 regardless of ranking.

23 10. The Cottage Shift Managers and Food Service Supervisors
24 exercise their supervisory duties with independent judgment. They
25 deny or approve leave requests and assign subordinate to work
26 stations or duties to maintain proper care to residents. They
27 train employees, direct employees, perform performance appraisals.
28 They have authority to discipline subordinate employees and can

1 effectively recommend the suspension or discharge of employees.
2 They also effectively participate in the hiring of employees.

3 **IV. CONCLUSIONS OF LAW**

4 1. The Board of Personnel Appeals has jurisdiction over this
5 matter pursuant to Section 39-31-207, MCA.

6 2. The Montana Supreme Court has approved the practice of
7 the Board of Personnel Appeals in using federal court and National
8 Labor Relations Board (NLRB) precedence as guidelines interpreting
9 the Montana Collective Bargaining for Public Employees Act as the
10 State Act is so similar to the Federal Labor Management Relations
11 Act. State ex rel Board of Personnel Appeals v. District Court,
12 183 Mont. 223, 598, P.2d 1117, 103 LRRM 2297 (1979); Teamsters
13 Local No. 45 v. State ex rel Board of Personnel Appeals, 195 Mont.
14 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v.
15 Young (III), 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

16 3. Section 39-31-103(9)(b)(ii), MCA, excludes all
17 supervisory employees from coverage by the Public Employees
18 Collective Bargaining Act. Section 39-31-103(11), MCA, defines a
19 "supervisory employee" as:

20 "...any individual having authority in the interest
21 of the employer to hire, transfer, suspend, lay-off,
22 recall, promote, discharge, assign, reward, discipline
23 other employees, having responsibility to direct them, to
24 adjust their grievances, or effectively to recommend such
25 action, if in connection with the foregoing, the exercise
26 of such authority is not of a merely routine or clerical
27 nature but requires the use of independent judgment."

28 4. The existence or exercise of any one of the criteria
listed in the statutory definition of a supervisory employee
combined with independent judgement is sufficient to accord
supervisor status, regardless of how frequently the power is

1 executed. George C. Foss Company v. NLRB, 752 F.2d 1407, 118 LRRM
2 274 (CA 9 1985). See also UD 6-88, Montana Federation of State
3 Employees, Petitioner vs. Montana Developmental Center, State of
4 Montana, Employer (August 15, 1988); UC 9-88, Montana Public
5 Employees' Association, Petitioner, vs. East Mont Human Services
6 Center, Department of Institutions, State of Montana, Respondent
7 (February 22, 1989).

8 5. The record shows that the Cottage Shift Manager and Food
9 Service Supervisor positions meet several of the criteria to be
10 designated as supervisors pursuant to Section 39-31-103(11), MCA.
11 These positions effectively recommend the hiring and the suspension
12 or termination of employees. Additionally, these positions have
13 the authority to direct, assign, and discipline employees. They
14 train, approve/deny leave requests, and perform performance
15 appraisals. The positions perform these duties using independent
16 judgment.

17 **IV. RECOMMENDED ORDER**

18 IT IS ORDERED the bargaining unit at the Montana Developmental
19 Center, which is represented by the American Federation of State,
20 County, and Municipal Employees, AFL-CIO, Montana Counsel No. 971,
21 be modified to exclude the Cottage Shift Manager and the Food
22 Service Supervisor positions.

23 DATED this 19th day of June, 1997.

24 BOARD OF PERSONNEL APPEALS

25 By: Stan Gerke

26 Stan Gerke
27 Hearing Officer
28

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 July 14, 1997.
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 Tom Foley, Field Representative
22 MT Council No. 9, AFSCME AFL-CIO
23 PO Box 5356
24 Helena, MT 59604

25 The undersigned hereby certifies that true and correct copies
26 of the foregoing documents were, this day, served upon the
27 following parties or such parties' attorneys of record by means of
28 the State of Montana's Deadhead mail service.

29 Bill Bentley
30 Labor Relations Bureau
31 Dept of Administration
32 Room 130 Mitchell Bldg
33 Helena, MT 59602

34 DATED this 19th day of June, 1997.

35 Christine A. Roland