

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-97:

YELLOWSTONE COUNTY,
STATE OF MONTANA
Petitioner

vs.
MONTANA PUBLIC EMPLOYEES
ASSOCIATION
Respondent

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on December 2, 1997. Carter N. Picotte, attorney for the Montana Public Employees Association, appealed from the Findings of Fact; Conclusions of Law; and Order issued by a Department hearing officer, dated October 6, 1997.

Appearing before the Board were Carter N. Picotte and Brent Brooks, Yellowstone Deputy County Attorney. Both individuals presented oral argument in person.

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 record does not indicate that the hearing officer's findings regarding Ms. Horton were erroneous. 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.

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

DATED this 22 day of January 1998.

BOARD OF PERSONNEL APPEALS

By: _____

James A. Rice, Jr.
Presiding Officer

Board members Rice, Talcott, Hagan and Perkins concur.

Alternate Board member Foley dissents.

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

CERTIFICATE OF MAILING

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

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

IN THE MATTER OF UNIT CLARIFICATION NO. 2-97:

YELLOWSTONE COUNTY,
STATE OF MONTANA

Petitioner,

vs.

MONTANA PUBLIC EMPLOYEES
ASSOCIATION (MPEA),

Respondent.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

On September 9, 1996, Petitioner Yellowstone County, Montana, submitted a Petition for Unit Clarification requesting that four positions within the Yellowstone County Courthouse Bargaining Unit ("Bargaining Unit") be excluded from that unit because of their supervisory responsibilities. The positions requested to be excluded from the Unit are as follow:

Yellowstone County Treasure's Office

Jeanne Vladic, Cash Management Supervisor

Judy Horton, Tax Supervisor

Yellowstone County Sheriff's Department

Suzanne Dupuis-Brown, Civil Division Supervisor

Carla Bracken, Records Division Supervisor

On October 9, 1996, the Respondent MPEA (Respondent) filed an answer to the petition denying that the four positions should be excluded due to their supervisory responsibilities. On October 17, 1996, this case was transferred to the Hearings Bureau for a contested case hearing. Pre-hearing negotiations did not dispose of

1 the supervisory issue concerning the four positions. After several
2 continuances stipulated between the parties, an in-person hearing
3 was conducted in Billings, Montana on April 24, 1997 by Gordon D.
4 Bruce, Hearings Officer. The Petitioner presented six witnesses
5 who gave sworn testimony: Jay Bell, Yellowstone County
6 Undersheriff; Suzanne DuPuis-Brown Civil Division Supervisor; Carla
7 Bracken, Records Division Supervisor; Jeanne Vladic, Cash
8 Management Supervisor; Judy Horton, Tax Supervisor and Cindy
9 Sellers, Yellowstone County Treasurer.

10 Joint Exhibits J-1 through J-17 were admitted into the record
11 without objection. Additionally, the organizational charts of the
12 Yellowstone County Treasurer's Department and the Yellowstone
13 County Sheriff's Department were used as demonstrative exhibits and
14 these organizational charts are appended to the Petition for Unit
15 Clarification (Exhibit J-1).

16 Parties submitted post-hearing briefs, and the record was
17 deemed closed on June 6, 1997.

18 II. FINDING OF FACTS¹

19 1. Jay Bell, Yellowstone County Undersheriff, ("Bell") has
20 been with the Yellowstone County Sheriff's Department
21 ("Department") for over twenty years and presently is second in
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 command under Sheriff Charles Maxwell. Bell revealed that a 1996
2 reorganization of the Department transferred a previous lieutenant
3 deputy sheriff, who was the supervisor of the Civil Division within
4 the Department, to other duties. (Testimony of Bell)

5 2. In July 1996, Suzanne Dupuis-Brown ("Brown") was
6 promoted to Civil Division Supervisor. Brown has worked in
7 numerous capacities with the Sheriff's Department. She has spent
8 eleven years in the Civil Division. Presently Brown supervises
9 three individuals within the Civil Division who are members of the
10 Bargaining Unit. (Testimony of Bell)

11 3. Brown is responsible for the overall performance of the
12 Civil Division. She conducts interviews for new positions. She is
13 responsible for new and continuous training for new and established
14 employees and is solely responsible for maintaining and completing
15 annual job performance evaluations, signing them as Civil Division
16 Supervisor. Additionally, she is solely responsible for arranging
17 the various work schedules for the three employees within the Civil
18 Division; solely responsible for approving vacation and sick leave
19 and solely responsible for preparing the Civil Division's budget
20 for the sheriff. (Testimony of Bell)

21 4. Brown exercises substantial discretion and independent
22 judgment in her responsibilities as supervisor. Her
23 recommendations concerning hiring or firing are an essential part
24 of those responsibilities. Further, she is authorized to submit
25 oral or written warnings or reprimands to Civil Division employees
26 without prior notification or approval from Bell. (Testimony of
27 Bell)

1 5. Brown is well-known within the Sheriff's Department for
2 her expertise in Civil Division matters. The Department relies
3 upon her heavily for training and direction of that division. She
4 is currently performing not only all the duties of the Civil
5 Division supervisor, but also additional expanded duties.
6 (Testimony of Bell)

7 6. Brown's numerous supervisory responsibilities include
8 training of new employees; evaluating job performance and
9 attendance; assigning work responsibility; sole responsibility for
10 discipline with the exception of suspension or termination (which
11 is the Sheriff's duty); responsibility for making recommendations
12 concerning promotions and hiring, and responsibility for the
13 overall performance of the Civil Division. (Testimony of Brown)

14 7. Brown is solely responsible for preparing and maintaining
15 the Civil Division budget. She devotes approximately one hour each
16 morning to scheduling the various duties of the day for the three
17 employees of the Civil Division concerning their work assignments
18 and also their vacation and sick leave records. She has attended
19 two supervisor training seminars during the past year. (Testimony
20 of Brown)

21 8. Brown provides guidance and training to the three
22 employees within the Civil Division, and also to deputies within
23 the Sheriff's Department concerning all civil matters performed by
24 the Department. Prior to her promotion, she had neither that
25 authority nor the authority to discipline employees. (Testimony of
26 Brown)

27 9. According to her job description, she is responsible for
28 the management and supervision of the Sheriff's Department's civil

1 operations section. Included within this job classification are
2 training, scheduling, organizing, directing, supervising, and
3 coordinating all activities of the Civil Division. (Exhibit J-13)

4 10. Because she supervises other Civil Division employees,
5 she wants to be excluded from the Bargaining Unit. (Testimony of
6 Brown)

7 11. *Carla Bracken* ("Bracken") is an eight-year employee of
8 the Department. She is presently the Records Division Supervisor
9 and supervises eight individuals employed by the Sheriff's Office
10 within the Records Division. She supervises a warrants clerk, a
11 records clerk and six complaint clerks. (Testimony of Bell and
12 Exhibit J-1)

13 12. Bracken recently completed computerized record retrieval
14 training for a new computer system utilized by the Department. She
15 is presently responsible for training all new employees within the
16 Records Division. She is also involved in the interview process of
17 each new employee. Similar to Brown, Bracken has sole
18 responsibility for maintaining, evaluating and presenting the
19 Records Division budget to the Yellowstone County Sheriff.
20 (Testimony of Bell and Exhibit J-16)

21 13. Bracken's uncontroverted testimony shows she also is
22 solely responsible for interviewing, and for making hiring and
23 firing recommendations to Undersheriff Bell or Sheriff Maxwell.
24 She independently designed and implemented the Records Division
25 interview format and questions. She is solely responsible for
26 training all new employees, for continuously training of current
27 employees (particularly as to Sheriff's Department policy and
28 procedure), and for managing the computerized state, local and

1 national record systems essential to operation of the Sheriff's
2 Department. (Testimony of Bracken)

3 14. Bracken is also responsible for completing employee
4 performance evaluations for Records Division employees. She signs
5 each evaluation as supervisor. She gives assignments to the eight
6 Records Division employees. She has the authority to make oral or
7 written reprimands or warnings without previous approval from
8 Undersheriff Bell or Sheriff Maxwell. She is responsible for the
9 overall performance of the Records Division. If there is deficient
10 performance in any category of that division, she is the person to
11 whom the sheriff or undersheriff speaks. (Testimony of Bracken)

12 15. Bracken's job description indicates that she has wide
13 discretion, performing her supervisory duties with independent
14 judgment. She is responsible for planning, organizing, scheduling,
15 assigning and supervising the eight employees within the Records
16 Division, for providing performance evaluations, and for making
17 effective recommendations concerning hiring or terminating
18 individuals. (Exhibit J-16)

19 16. Bracken wants to be excluded from the Courthouse
20 Bargaining Unit. (Testimony of Bracken)

21 17. Bell has very infrequent contact with either Brown or
22 Bracken, and often does not speak with them concerning their
23 supervisory duties for several days at a time. Both supervisors
24 are much more knowledgeable and conversant within their respective
25 Division than Bell. (Testimony of Bell)

26 18. Employees within the Civil Operations and Records
27 Division have been told that Brown and Bracken are their
28 supervisors. Both Brown and Bracken have long-term experience in

1 the Sheriff's Department. They discharge their supervisory
2 responsibilities with a large degree of independent judgment, which
3 is expected and encouraged by the Sheriff. (Testimony of Bell)

4 19. *Cindy Sellers* ("Sellers") is the Treasurer of Yellowstone
5 County and that office contains twenty-three employees. Twenty-one
6 of these employees are members of the Courthouse Bargaining Unit,
7 two are not. Three employees are currently performing supervisory
8 responsibilities: Marty Pryor ("Pryor"), Motor Vehicle Supervisor,
9 Jeanne Vladic, Cash Management Supervisor, and Judy Horton, Tax
10 Supervisor. (Testimony of Sellers and Exhibit J-1)

11 20. Pryor supervises fourteen employees and has been the
12 Motor Vehicle Division Supervisor for approximately three years.
13 Jeanne Vladic ("Vladic") is the Cash Management Supervisor and
14 supervises four employees within Cash Management. She has been the
15 supervisor since 1988 and has been with the Treasurer's Department
16 for approximately twenty-three years. Judy Horton ("Horton") is
17 Tax Supervisor and previously managed three employees. Now two
18 positions have been eliminated and she supervises one employee.
19 Horton has worked in the Treasurer's Office for approximately
20 twenty-two years and has been the Tax Supervisor since 1990.
21 (Testimony of Sellers)

22 21. Both Horton and Vladic are responsible for training new
23 and established employees. Both are integral, essential members
24 of the interviewing committee for new employees. Both Sellers and
25 one of the supervisors maintain identical score cards during new
26 employee interviews. They discuss and decide hiring based upon
27 equal input and scoring from both Sellers and the applicable
28 supervisor. (Testimony of Sellers)

1 22. Both Horton and Vladic are solely responsible for annual
2 job performance evaluations and sign the evaluations as respective
3 supervisors. They have authority to discipline employees through
4 written or verbal warnings or reprimands without prior approval
5 from Sellers. (Testimony of Sellers)

6 23. Both Vladic and Horton are responsible for work
7 schedules, vacation and sick leave within their respective
8 divisions. They are responsible for the management and
9 presentation of budgets to the treasurer within their respective
10 divisions. They are responsible for policy and procedure guidance
11 to other division employees. They direct their respective tax
12 division employees in their daily duties. Each of these two
13 supervisors is solely responsible for the overall performance of
14 her division. (Testimony of Sellers)

15 24. Sellers periodically schedules supervisory meetings and
16 includes Horton and Vladic in those meetings. Cash management
17 employees and property tax employees are aware that Vladic and
18 Horton are their respective supervisors. When issues arise
19 concerning one of the three divisions, Sellers discusses the matter
20 with the particular supervisor involved--Vladic, Horton or Pryor.
21 Each supervisor is solely responsible for division performance.
22 (Testimony of Sellers)

23 25. Although Horton, Vladic and Pryor are within the Taxing
24 Division of the Treasurer's Office, only Pryor is excluded from the
25 Bargaining Unit. (Testimony of Sellers)

26 26. Vladic has been the Cash Management supervisor since 1988
27 and has been an employee of Yellowstone County in the Treasurer's
28 Office for approximately twenty-three years. She supervises,

1 trains and disciplines the Head Cashier, an Account Clerk I, a
2 Cashier, and an Account Clerk II. Vladic makes independent
3 decisions and judgments for Cash Management and prepares the
4 budget. She provides guidance to all employees on Treasurer's
5 Department policy and procedure, and is solely responsible for the
6 performance of the Cash Management Department. Vladic is
7 responsible for effectuating any changes in procedures or policy
8 due to legislative changes. (Testimony of Vladic)

9 27. Vladic assigns duties to the four Cash Management
10 employees and administers verbal or written reprimands and warnings
11 without prior approval from the Treasurer. She is solely
12 responsible for job performance evaluations of the Cash Management
13 employees and signs written evaluations as their supervisor.
14 (Testimony of Vladic)

15 28. Vladic and Sellers are the sole individuals responsible
16 for hiring and interviewing for positions within Cash Management.
17 Vladic has authority to make effective recommendations concerning
18 hiring and termination and recently made such a recommendation for
19 an employee's promotion to the Treasurer's Office. Subsequently,
20 that employee was promoted pursuant to Vladic's recommendation.
21 (Testimony of Vladic)

22 29. When Sellers is away from the Treasurer's Office, Vladic
23 is usually in charge of the office during her absence and is
24 empowered to make decisions for the Treasurer. (Testimony of
25 Vladic)

26 30. The Class Specification for the Cash Management
27 Supervisor (Vladic's position) contains numerous references to
28 planning, organizing, directing, supervising and coordinating all

1 operations and other activities for the Cash Management Department
2 in the Treasurer's Office. Vladic's position has considerable
3 discretion in the exercise of independent judgment and initiative.
4 The supervisor is solely responsible for training, scheduling, and
5 evaluation of employee performance, and for directing the work
6 responsibilities of employees classified as Cashier, Head Cashier,
7 Account Clerk I and Account Clerk II. The supervisor position is
8 also paid a higher salary than that received by subordinates.
9 (Testimony of Vladic and Exhibit J-14))

10 31. The four employees within Cash Management recognize and
11 view Vladic as their supervisor. She desires to be excluded from
12 the Bargaining Unit due to her supervisory responsibilities and the
13 difficulty of representing the interest of management--the
14 Treasurer--as opposed to the Bargaining Unit. (Testimony of
15 Vladic)

16 32. Horton is the Tax Supervisor and has held that position
17 since 1990. Previously, she was an assistant to the treasurer.
18 She continues to be responsible for maintaining the work schedule
19 of not only the Tax Department, but also the entire Treasurer's
20 Office since 1981. (Testimony of Horton)

21 33. Horton originally supervised three employees, but now
22 supervises one delinquent tax clerk ("clerk") due to elimination of
23 two positions within the division. Horton is solely responsible
24 for assigning duties to the clerk, as she did for the previous
25 positions. She continues to submit job performance evaluations for
26 the clerk and signs as supervisor on those pertinent documents.
27 Horton is authorized to issue oral or written reprimands or
28 warnings to the clerk. (Testimony of Horton)

1 34. Horton is solely responsible for reconciling and
2 collecting property taxes and for her portion of the budget in the
3 Taxing Division. Although she has assumed certain clerical duties
4 since two positions were eliminated, she receives a higher salary
5 than the clerk position remaining under her direct supervision.
6 (Testimony of Horton and Exhibit J-15)

7 35. Horton is accountable to Sellers if there is a deficiency
8 within her area of responsibility. The Class Specification for Tax
9 Supervisor (Horton's position) contains numerous references to the
10 exercise of independent judgment, planning, organizing, directing,
11 supervising and coordinating the duties of subordinate employees.
12 Horton also works on vacation schedules for the Treasurer's Office.
13 She schedules work and evaluates the work performance of the
14 delinquent tax clerk, and formerly the mobile home and personal
15 property tax clerks. Horton assigns, prioritizes and supervises
16 work within the Division as required by her job description.
17 (Testimony of Horton and Exhibit J-15)

18 36. If there is a problem or a recommendation concerning
19 hiring, firing, discipline or promotion within the tax unit, Horton
20 makes recommendations solely to Cindy Seller, Treasurer, and her
21 recommendations are given great weight by the Treasurer.
22 (Testimony of Horton)

23 37. Horton desires to be excluded from the Bargaining Unit
24 due to potential conflicts arising if she should be required to
25 reprimand or take other adverse action against her assistant. She
26 feels that acting in a supervisory position as a member of the MPEA
27 presents problems in maintaining loyalty to both her employer and
28 the employee she presently supervises. (Testimony of Horton)

1 III. DISCUSSION

2 The Board of Personnel Appeals (BOPA) properly uses federal
3 court and National Labor Relations Board (NLRB) precedents as
4 guidelines in interpreting the Montana Collective Bargaining for
5 Public Employees Act; the state Act is similar to the Federal
6 Labor Management Relations Act. *State ex rel. Board of Personnel*
7 *Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117, 103 LRRM
8 2297 (1979); *Teamsters Local No. 45 v. State ex rel. Board of*
9 *Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012
10 (1981); *City of Great Falls v. Young (Young III)*, 686 P.2d 185, 119
11 LRRM 2682 (1984).

12 Section 39-31-103(11), MCA (1995), provides the definition and
13 criteria employed by the State of Montana in determining whether or
14 not a particular employee is "supervisory." This statute is
15 virtually identical to 29 U.S.C. § 152(11), part of the National
16 Labor Relations Act (NLRA). Employees who are supervisors are
17 exempt from both the state and federal definitions of public
18 employee, primarily as a matter of policy, to improve the
19 peacefulness of labor relations between employers and employees and
20 to allow employers to have the undivided loyalties of these key
21 employees. *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d
22 1076, 1078 (6th Cir. 1987). Whether an employee is a supervisor
23 depends on the duties performed by that employee for the
24 organization, including one or more of the duties outlined in
25 Section 39-31-103(11), MCA: the power of assignment, reward,
26 suspension, layoff, recall, transfer, determination of wages,
27 discipline, hiring and discharge, responsible direction of
28 subordinate employees, power to **effectively recommend** any of the

specifically listed duties and the use of independent judgment which is beyond routine or clerical duties. *Id.* at 1078 (emphasis added). See also, *NLRB V. Health Care and Retirement Corp. of America*, ____ U.S. ____, 114 S. Ct. 1778, 1780 (1994). If an employee has the authority to perform even one of the twelve listed activities with the use of independent judgment, then he or she should be excluded from the Courthouse Bargaining Unit. *NLRB V. Konig*, 79 F.3d 354, 357 (3rd Cir, 1996) citing *Health Care and Retirement Corp.*, *supra*, 114 Supp. CT. 1780; *Manor West, Inc. v. NLRB*, 60 F.3d 1195, 1197 (6th Cir. 1995); *Kaczynski v. Draper Printing*, 848 F. Supp. 1060, 1063 (D. Mass. 1994).

Section 39-31-103(11), MCA, outlines the various statutory powers which define a supervisory employee. The statute is read in the "disjunctive." If the four employees in this matter have the authority to perform even one of the statutory powers, this is sufficient to confer supervisory status and exclude them from the Bargaining Unit so long as independent judgment is used in the performance of one or more of the specifically listed powers.

An individual need not meet all of the criteria listed...in order to qualify as a "supervisor." Indeed, it is well settled that an individual who meets only one of the criteria qualifies as a "supervisor"...

E and L Transport Co. V. NLRB, 85 F.3d 1258, 1269 (7th Cir. 1996) citing *NLRB V. Winnebago Television Corp.*, 75 F.3d 1208, 1212 (7th Cir. 1996); *NLRB v. Konig*, *supra*, 79 F.3d at 357-158; *Northeast Utilities Service Corp. v. NLRB*, 35 F.d. 621, 624 (1st Cir 1994); *Manor West, v. NLRB*, *supra*, 60 F.3d. At 1197; *Kaczynski v. Draper Printing*, *supra* at 1063.

Respondent essentially argues that the supervisors spend a "trivial" amount of time in any supervisory capacity. When an employee possesses at least one of the authorities under the supervisory statute, he or she is indeed a supervisor regardless of the frequency within which these responsibilities are exercised. It is well settled that if an individual is shown to exercise supervisory authority, the frequency with which he/she exercises that authority does not negate the necessary conclusion that he/she is a statutory supervisor. *E and L Transport Co. v. NLRB*, supra, at 1270; *Northeast Utility Service Corp v. NLRB*, supra, at 624.

It is the function of the employee that is critical rather than the label or title. Therefore, it is a question of fact in each individual case as to whether the individuals involved are supervisors. *Kaczynski v. Draper Printing*, supra. The exercise of any one of these statutory supervisory criteria must be accomplished with at least some independent judgment and cannot be routine clerical or perfunctory. *Desert Hospital v. NLRB*, 91 F.d. 189, 192-193 (D.C. Cir. 1993).

The following considerations for determining supervisory status were recommended by BOPA pursuant to *Billings Firefighters Local 521 v. City of Billings*, UC 1-77:

Whether the employee has independent authority to perform the functions enumerated in the Act.

Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

1 Whether a substantial amount of the employee's time is
2 spent doing work which is similar to the work of the
subordinates.

3 Whether an unrealistic and excessively high ration of
4 supervisors to employees would be created.

5 BOPA has astutely noted that state government supervisors are
6 subject to greater review than private sector counterparts. They
7 have subjectively less freedom to exercise their authority by the
8 nature of their employment; however, this does not lessen the
9 ultimate authority of the incumbents in their status as a
10 supervisor. The record reflects that they *effectively recommend*
11 concerning key criteria analyzed such as hiring and firing. See,
12 e.g., *Montana Public Employees Association vs. Department of*
13 *Institutions*, UC 9-88 (1989). Finally, employees have nevertheless
14 been found to be supervisors, even though restricted by federal
15 guidelines and company policies where they were nevertheless
16 performing at least one of the twelve statutory criteria. *Maine*
17 *Yankee Atomic Power Co. v. NLRB*, *supra*, 624 F.2d at 362.

18 The record reveals that certain categories, such as the
19 following, clearly illustrate the supervisory status of these four
20 County employees. They overwhelmingly satisfy not merely one, but
21 several of the primary statutory criteria, as well as several
22 secondary indicia of supervisory status.

23 INTERVIEWING/HIRING

24 Bracken, Brown, Horton and Vladic are directly and integrally
25 involved in the interviewing and hiring process. They add
26 persuasive input in the final decision concerning hiring within the
27 division. All four uniformly participate in interviewing for
28 positions within their sections and divisions. The ability and

1 authority to make effective recommendations concerning the hiring
2 of a prospective employee is one of the statutory criteria which
3 makes all four of these individuals supervisors.

4 In *Montana Public Employees Association vs. Department of*
5 *Institutions*, UC 9-88 (1989), the Board determined that
6 Habilitation Aid III's were supervisors and excluded from the
7 bargaining unit. The Habilitation Aide III's participated in the
8 selection committee and interview process for subordinate
9 employees, although the final decision was made by a facility
10 superintendent. They had the authority to effectively recommend
11 and influence the promotion of subordinates and the granting of
12 other awards. They also had the authority to responsibly direct
13 the work of subordinates.

14 All of the four Yellowstone County supervisors have been and
15 continue to be instrumental in the interview and hiring process
16 with their Department heads in making the ultimate hiring decision.
17 Employees, who are intimately and crucially involved in the
18 interview and hiring process, are supervisors for that reason
19 alone, since their recommendations required the use of independent
20 judgment and discretion. For example, in *Desert Hospital v. NLRB*,
21 *supra*, at 193, the D.C. Circuit concluded that although a
22 particular nurse-supervisor did not actually hire employees, she
23 was involved in the initial screening interviews. Such action
24 showed that she was "aligned with management as her hiring and
25 evaluation work was a regular and frequent portion of her
26 responsibilities."

27 All four employees in this case are relied upon heavily for
28 ultimate recommendations in hiring, and in conducting and

1 formatting the interview process prior to making their
2 recommendations to the Department heads. All four employees meet
3 the requisite criteria and should be excluded.

4 An employee may be excluded if he has authority over any
5 one of the twelve enumerated personnel actions, including
hiring...

6 *NLRB v. Yeshiva*, 444 U.S. 672, 682, N. 13, 100 S. Ct. 856, 862, N.
7 13 (1980). The fact that these four employees do not make the
8 ultimate hiring decision does not exclude them from supervisory
9 status under the twelve criteria.

10 The fact that Hilgendorf may not have executed the
11 decision does not undermine his predominate role in
reaching that decision.

12 *NLRB v. Winnebago Television Corp.*, *supra*, 75 F.3d at 1208.

13 ...The NLRB's argument proves too much. It transforms
14 the effective recommendation requirement of §152(11) into
15 a requirement that a supervisor reach and execute hiring
16 decisions himself....This would exclude from supervisor
17 classifications all but the most senior managerial
personnel, for more often than not persons higher up the
chain of command sign on the dotted line and execute
decisions effectively made by those below...

18 ***

19 To require that a supervisor's opinion always be regarded
20 as scripture by those senior to him within the business
21 organization would turn common sense on its head...,
Kowalski's decision to act contrary to Hilgendorf's
recommendation in one case does not dilute the
significance of Hilgendorf's role in personnel decisions.

22 *Id.* At 1216. Respondent has failed to present any evidence which
23 contradicts the crucial role these four employees have concerning
24 decisions about interviewing and hiring.

25 RESPONSIBLE DIRECTION OF AND ASSIGNMENT TO SUBORDINATES

26 The authority to make assignments and responsibly direct other
27 employees as they perform those assignments is another criteria met
28 by these four employees. They do not have daily contact with

1 Department heads, and are not required or expected to do so. They
2 each have years of experience and expertise in their respective
3 positions, and prior experience in directing subordinate employees.
4 Both the Treasurer and Sheriff rely upon these four employees to
5 conduct many of their duties independently. This is another
6 criteria met to exclude all four of these individuals from the
7 Courthouse Bargaining Unit.

8 Respondent argues that all four employees are merely "lead
9 workers" who perform mundane, ministerial, perfunctory duties which
10 infrequently touch upon the assignment and directions of work
11 concerning less experienced employees. The facts belie any such
12 conclusion. Respondent seems to suggest that both the Sheriff's
13 Office and Treasurer's Office procedures limit the authority of
14 these employees to assign duties to their respective subordinate
15 workers. However, the record reflects that all four supervisors
16 utilize their independent discretion and judgment in making work
17 assignments, and in transferring subordinates to other assignments
18 or positions when necessary.

19 Government supervisors may be more limited by statutory-
20 mandated and implemented policies and procedures. All four of
21 these employees have the authority to assign or transfer work to
22 their subordinates very similar to that found in UC 9-88, supra.
23 In that case, the Board held that the "authority to transfer within
24 her particular area of responsibility is more than routine or
25 clerical." The Board further concluded that if the Habitation Aid
26 III'S were not supervisors, it would leave substantial time during
27 which the considerable number of subordinate employees would work
28 without any supervision. See also, *Schnuck Markets, Inc. v. NLRB*,

1 961, F.2d 700, 705-706 (8th Cir. 1992). In Schnuck, if a night
2 manager was a nonsupervisory, ministerial employee, then a store
3 with a two or three million dollar inventory was without a
4 supervisor for eight hours every day. The Court rejected the NLRB
5 findings and held that the night manager, even though he did not
6 have the authority to hire or fire, did effectively and
7 independently direct subordinates and had authority to manage,
8 assign, work and admonish employees who were not doing their job.
9 This was sufficient to make this employee a supervisor. *Id.* at
10 704-705. Similarly in *NLRB v. Beacon Light Christian Nursing Home*,
11 *supra*, at 1079-1080, the Sixth Circuit concluded that those who use
12 independent judgment in responsibly directing the work of others
13 qualified as supervisors, where certain L.P.N.'s instructed
14 subordinate nurse's aides, were their team leaders, assigned
15 patients to the nurse's aides, and were responsible for their work
16 product.

17 Respondent further argues that because these four workers work
18 alongside their subordinates, they are not. But this does not
19 render them nonsupervisory employees.

20 Although she works alongside of the other employees in
21 photo archives, Mrs. Morrow assigns and schedules their
22 work, signs their time sheets, approves sick leave and
vacation, and ... the two employees under her guidance
think of her as a supervisor.

23 *Montana Historical Society vs. Montana Federation of State*
24 *Employees, MFT, AFT, AFL-CIO*, UC 5-85 (1986)

25 A supervisor may perform many of the same functions as a
26 subordinate without leaving the role of supervisor. *Schnuck*
27 *Markets, Inc. v. NLRB, supra*, at 707.

1 And again, the fact that the supervisors may perform many of
2 the same tasks as their subordinates does not dilute their
3 supervisory responsibilities. *Schnuck Markets, Inc., v. NLRB*,
4 *supra*, 961 F.2d at 706-707 ("The fact that Jennings spent a portion
5 of his time on manual labor is not controlling....Shift managers at
6 a fast food restaurant were found to be supervisors even though
7 they spent 40 to 60 percent of their time as regular counter
8 employees."). *Id.* at 706-707 (citations omitted). See also, *NLRB*
9 *v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 940-941
10 (5th Cir. 1993), where the Circuit Court held that although senior
11 operators performed many of the same tasks as lower-ranking
12 personnel, where their duties included, among other things,
13 directing subordinates and "making sure everything is running all
14 right," they were in fact supervisors.

15 All four employees are responsible for the performance and
16 discharge of their respective division duties. That responsibility
17 is precisely what has excluded employees from the bargaining units
18 in federal cases. See, e.g., *Northeast Utilities Service Corp.*,
19 *supra*, at 625 citing *Main Yankee Atomic Power Co. v. NLRB*, 624,
20 F.2d 347, 360 (1st Cir. 1980) ("To be responsible is to be
21 answerable for the discharge of a duty or obligation."); *NLRB V.*
22 *Beacon Light Christian Nursing Home*, *supra*, at 1079; *NLRB V. KDFW-*
23 *TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986) ("In determining
24 whether direction in any particular case is responsible, the focus
25 is on whether the alleged supervisor is held fully accountable and
26 responsible for the performance and work product of the employees
27 he directs."). Here, it is clear that the four Yellowstone County
28 supervisors also satisfy this criterion.

AUTHORITY TO DISCIPLINE, EVALUATE AND
RECOMMEND EXCLUDES THESE FOUR SUPERVISORS
FROM THE BARGAINING UNIT

The uncontroverted and unrebutted testimony of these four employees establishes their requisite authority in administering their respective supervisory duties. The responsibility and duty to administer annual, regular job performance evaluations, to administer verbal and written reprimands and warnings, and to make recommendations concerning demotions, promotions, hiring, and terminations are indeed the hallmarks of a supervisor and have been consistently recognized by both the BOPA and federal case law. *Elliott Coal Mining v. Director, Office of Workers' Compensation*, 17 F.3d 616, 637 (3rd Cir. 1994) ("Supervisors include persons who have the power to make effective recommendations about employee disciplinary measures, not just those who carry them out."); *Desert Hospital v. NLRB*, *supra*, at 193 (Nurse supervisor was excluded from the bargaining unit because she was involved in the screening interviews, was aligned with management as her hiring and evaluation work was a regular and frequent portion of her responsibilities even though reprimands and warnings issued by her were reviewed and investigated independently by her own supervisor.); *E and L Transport Co. v. NLRB*, *supra*, at 1270 (Supervisor issuing cargo damage reprimands held to be a supervisor even though the reprimands were infrequent. Frequency was irrelevant. Exercising authority to discipline fellow employees alone satisfied the statutory criteria.)

In *NLRB v. Beacon Light Christian Nursing Home*, *supra*, at 1079 L.P.N.'s were found to be supervisors even though they did not personally have the power to discharge or promote. They were

1 responsible for evaluation and discipline and the evaluation
2 reports were:

3 ...serious attempts to determine the employee's
4 progress and constituted 'recommending actions'
5 within the meaning of the NLRA. 29 U.S.C. §
6 152(11)....We reject the Board's focus only on the
end results of the L.P.N.'s efforts because it
obscured the meaningfulness of the L.P.N.'s
disciplinary and evaluative functions.

7 See also, *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th
8 Cir. 1986) (written reprimand signed by individual as "company
9 supervisor" together with periodic evaluations, warnings, etc.,
10 were sufficient to exclude employee as a supervisor).

11 The evaluation, discipline and recommendation process are
12 crucial functions of these four employees. This fact alone
13 excludes them from the Bargaining Unit because they exercise such
14 duties with independent judgment without prior approval from the
15 elected Department heads. See U.C. 5-85 where an employee who
16 supervised two others had authority to recommend termination of an
17 employee and was excluded from the Bargaining Unit as a supervisor.

18 INDEPENDENT JUDGMENT

19 These four employees have sole responsibility, together with
20 the elected Department head, to assign work, transfer work or
21 employees within their division, admonish and encourage employees
22 within their division concerning their performance and take
23 corrective action where necessary. These responsibilities are
24 recognized as the exercise of independent judgment on a consistent
25 basis. *NLRB v. McCullough Environmental Services, Inc.*, *supra*, at
26 941 (reassignments and ordering an employee to correct a mistake
27 requires an exercise of independent judgment); *Schnuck Markets,*
28 *Inc., v. NLRB*, *supra*, at 704 (assigning work to employees and

admonishing employees for poor performance required the exercise of independent judgment and were not merely clerical or routine); U.D. 6-88, p.16, (discipline and direction of subordinates is the exercise of independent judgment); U.C. 4-90, p. 4-5 (correctional officer supervisor held to exercise independent judgment when assigning specific work duties, transferring employees within the division, counseling poorly performing employees and initiating disciplinary procedures).

All four of the employees exercise independent judgment as indicated not only by their own testimony, but also by the two Department head supervisors, Cindy Sellers and Jay Bell. The unrefuted facts satisfy another statutory criteria rendering these individual supervisors.

**SECONDARY INDICATORS ALSO OVERWHELMINGLY
SUPPORT THE EXCLUSION OF THESE FOUR SUPERVISORS**

The evidence presented in this case clearly reveals each of these four employees to be supervisors. There are also "secondary indicia" that these individuals can be considered supervisors. Some of these secondary criteria include: whether the employee is considered by other workers and by himself as a supervisor; whether he is held out to be a supervisor; whether he has a greater salary; whether he identifies with management and attends management meetings; whether the supervisor was considered as a person in authority; and whether he or she has attended supervisor training. All of these secondary indicators were proved and were uncontroverted by respondent. All of these secondary indicators have been approved in determining an employee as a supervisor and excluding them from a bargaining unit. *E and L Transport v. NLRB*,

1 *supra*, at 1270; *Schnuck Markets, Inc. v. NLRB*, *supra*, at 706; *NLRB*
2 *v. Chicago Metallic Corp.*, *supra*, at 531; (attendance at
3 supervisory seminars, training and instruction of others, reporting
4 rule infractions, recognition as supervisor by subordinates, etc.,
5 among other criteria meet the secondary test for supervisory
6 status).

7 Respondent suggests that in the case of the Sheriff's
8 Department, a reorganization cannot lead to the promotion of long-
9 term employees to supervisory positions. This is precisely what
10 occurred in U.C. 4-90. In that case, there was substantial
11 reorganization within the Women's Correctional Center then located
12 in Warm Springs, Montana. The Board noted the authority and
13 ability on the part of state government to reorganize and provide
14 supervisors during that reorganization in light of the actual
15 responsibilities of those individuals. Similarly, in U.C. 5-85,
16 the Board recognized the ability to reorganize and deemed this
17 reorganization of the Montana Historical Society as being the
18 catalyst for a long-term employee to be elevated to supervisory
19 status even though she supervised only two employees. The Board
20 looked at the *responsibilities* rather than the quantity of
21 employees she supervised, ultimately finding she was indeed a
22 supervisor.

23 Respondent argues unconvincingly that these four employees
24 cannot be supervisors because they lack ultimate authority to hire
25 or fire, or because they must consult someone higher in the chain
26 of command during an emergency or an atypical problem. However,
27 *see, e.g., NLRB v. McCullough Environmental Services, Inc.*, *supra*,
28 at 942; U.C. 9-88, pp. 4-6; U.D. 6-88, pp. 15-16. It is the

relationship of the evaluation and disciplinary role to the whole organization that is important. U.C. 9-88, p. 8, citing *NLRB v. Beacon Light Christian Nursing Home*, *supra*, at 1076. Although Government supervisors are potentially subject to greater review than their private counterparts this does not eliminate them as supervisors because of their more restrictive authority. U.D. 6-88, p. 15; U.C. 9-88, p. 5.

Finally, BOPA affords great weight to the desires of the affected employees. All four of these employees indicate their unequivocal desire to be excluded from the Courthouse Bargaining Unit. Combining this desire with the other factors presented herein, these individuals are indeed supervisors and should be excluded as a matter of law from the Bargaining Unit. *See, e.g., Kaczynski v. Draper Printing*, *supra*, 848 F.Supp. at 1062, Note 1.

Here, a clear potential for a conflict of interest lies in these supervisors authority to influence and control substantially all personnel decisions that affect the employment of subordinates. These four individuals are indeed supervisors in light of the totality of all the organizational duties which they perform. They make effective recommendations concerning hiring, are essential to the interview process, and responsibly direct, discipline, evaluate and exercise independent judgment in the performance of these duties. They are not simply lead workers, but are essential to the supervision of support employees; therefore, it is appropriate that these supervisors be excluded from the bargaining unit.

1 IV. CONCLUSIONS OF LAW

2 1. The Board of Personnel Appeals has jurisdiction in this
3 matter pursuant to the Montana Collective Bargaining for Public
4 Employees Act, Section 39-31-101, et seq., MCA.

5 2. The Petition by Yellowstone County to exclude the four
6 supervisory positions from the Courthouse Bargaining Unit is
7 GRANTED pursuant to A.R.M. 24.26.630(5).

8 DATED this 6TH day of October, 1997.

9 BOARD OF PERSONNEL APPEALS

10 By: Gordon D. Bruce
11 Gordon D. Bruce
12 Hearing Officer

13 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
14 shall become the Final Order of this Board unless written
15 exceptions are postmarked no later than _____.
16 This time period includes the 20 days provided for in ARM
17 24.26.215, and the additional 3 days mandated by Rule 6(e),
18 M.R.Civ.P., as service of this Order is by mail.

19 The notice of appeal shall consist of a written appeal of the
20 decision of the hearing officer which sets forth the specific
21 errors of the hearing officer and the issues to be raised on
22 appeal. Notice of appeal must be mailed to:

23 Board of Personnel Appeals
24 Department of Labor and Industry
25 P.O. Box 6518
26 Helena, MT 59604
27
28

* * * * *

CERTIFICATE OF MAILING

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

Brent Brooks Deputy County Attorney
Yellowstone County Courthouse
PO Box 35041
Billings MT 59107

Carter N Picotte
Montana Public Employees Assoc
PO Box 5600
Helena MT 59604

DATED this 6th day of October, 1997.

Sandra K. Page