

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

IN THE MATTER OF UNIT CLARIFICATION NO. 9-97:

STATE OF MONTANA, DEPARTMENT
OF CORRECTIONS, MONTANA STATE
PRISON, AND LABOR RELATIONS
BUREAU, DEPARTMENT OF
ADMINISTRATION,

Petitioner,

vs.

FEDERATION OF MONTANA STATE
PRISONER PROFESSIONAL
CORRECTIONAL NURSES, MFSE,
MFT, AFT, AFL-CIO,

Respondent.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

I. INTRODUCTION

On January 21, 1997, the Montana Department of Administration, State Personnel Division, Labor and Employee Relations Bureau filed a Unit Clarification petition on behalf of the Montana Department of Corrections. On April 1, 1997, the union filed a response rejecting the assertion that the positions which sought to be excluded from the unit were supervisory positions. On September 23, 1997, a prehearing conference was held where it was agreed that December 10, 1997 be the date of hearing. Exhibits were to be exchanged on December 1, 1997. On December 10, 1997, both parties concurred that the hearing be continued until February 3, 1998. Exhibits and witness lists were to be exchanged by January 5, 1998. Mike Furlong, Hearings Officer, conducted the hearing on this matter on February 3, 1998 in Deer Lodge, Montana.

1 At the hearing, Vivian V. Hammill represented the
2 Petitioners, and Stacey Collette-Cummings represented the
3 Respondents. Petitioner representative for the State of Montana
4 Labor and Employee Relations Bureau, Department of
5 Administration, Bill Bentley, and Petitioner representative for
6 the Montana Department of Corrections, Anita Larner, were present
7 for the hearing. Respondent's representatives Stephanie Coyne,
8 Sandra Pederson and Zella Dennis were present throughout the
9 hearing. Petitioners called Health Services Manager, Norma Jean
10 Boles; Nurse Professional III, Stephanie Coyne; and Nurse
11 Professional III, Sandra Pederson as witnesses. Respondents
12 called Health Services Manager, Norma Jean Boles; RN II, Frances
13 Guaglio; LPN, Eunice Cole; Nurse Professional III, Stephanie
14 Coyne; Nurse Professional III, Sandra Pederson and Nurse
15 Professional III, Zella Dennis as witnesses.

16 Petitioners' Exhibit A-1 and Respondents' Exhibits
17 1 through 5 were admitted without objection. The parties
18 submitted post hearing briefs on April 21, 1998, as stipulated to
19 during the hearing.

20 **II. ISSUE**

21 The issue in this matter is whether three Nurse
22 Professional III positions (Nos. 22691, 22672 and 22674) are
23 properly excluded from the existing bargaining unit based
24 upon supervisory duties, pursuant to § 39-31-103 (11), MCA.

25 **III. FINDINGS OF FACT**

26 1. The Montana State Prison in Deer Lodge, Montana has
27 three Nurse Professional III positions, classified at a grade 16
28 under the state classification system. Individuals employed in

1 the Nurse Professional III positions must be licensed registered
2 nurses. Currently, the individuals employed in those positions
3 are members of the bargaining unit at the Prison.

4 2. One Nurse Professional III is assigned to each of the
5 three designated eight hour shifts each day: from 6 a.m. to
6 2 p.m.; 2 p.m. to 10 p.m.; and 10 p.m. to 6 a.m. The Nurse
7 Professional III on each shift is charged to provide care for
8 infirmiry patients and act as shift supervisor.

9 3. In addition to the Nurse Professional III, there are
10 two Registered Nurse II's (RNs; grade 15), five Licensed
11 Practical Nurses (LPNs; grades 11 and 12) and two Correctional
12 Health Services Technicians (CHS Techs; grade 11) on the first
13 shift. On second shift there are two RN IIs, four LPNs and two
14 Correctional Health Services Technicians. On third shift, the
15 Nurse Professional III is normally the only RN, on duty with one
16 LPN and one CHS Tech. All LPNs, CHS Techs, and RN IIs are also
17 members of the bargaining unit. Nurse Professionals III, RN IIs
18 and LPNS work within the regulatory guidelines of their
19 respective licenses to perform assigned patient care duties.

20 4. According to the position description, Nurse
21 Professional III supervisory duties assigned to the individuals
22 employed as shift supervisors for the first and third shifts are
23 as follows (Exhibits B and C, at Section D):

24 Supervises Infirmiry staff by providing direct assistance
during assigned shift.

- 25 1. Supervises Infirmiry staff by assigning staff to
26 specific shift duties, scheduling work shifts,
granting ETO's, vacations, sick leave, and leave
without pay.
- 27 2. Maintains staff Payroll and submits to Accounting
28 in a timely manner assuring staff receive their
income, overtime pay, compensatory time credit and
short change pay.

3. Conducts performance evaluations on all shift staff unique to their positions carried out in a written and oral conference.
4. Disciplines employees as necessary by following department discipline handling policy and procedure to assure employee rights are protected while correcting behaviors.
5. Participates in the hiring process of RN's, LPN's, and Infirmary Aides by review of applicants credentials and applications, then developing interview questions, conducting interviews and submitting recommendations to the Unit supervisor.
6. Orientates new staff members to shift duties, institution safety, policy and procedures.
7. Verifies current credentials of self and staff to include, but is not limited to position licensure, CPR, and EMT.
8. Attends continuing education seminars appropriate to position and profession, self and staff.
9. Conducts shift staff meetings to disseminate information delegated by Infirmary supervisor and receive input from shift staff.
10. Attends shift leader meetings as delegated by Infirmary supervisor to problem solve and coordinate shift duties.

5. Supervisory duties assigned to the third shift Nurse Professional III are identical to those duties listed in items 1 through 10 for the first and second shifts except that it also lists and additional item, 11, which reads as follows:

11. Assigns and assumes special projects to include but is not limited to special project list specific to position; HIV project; medical clearances for pre-release centers and boot camp and fire crew; immunization clinics; equipment loans; maintenance of Infirmary supplies and equipment; inpatient charts and care plans.

6. The Health Service Manager with the Department of Corrections is responsible for health services at the Montana State Prison, in addition to the Women's Prison, Pine Hills School, Swan River camp and the regional prisons, and also supervises, trains and mentors all nursing staff at those facilities. The Health Service Manager meets at least monthly with the employee's occupying the Nurse Professional III

positions at the prison infirmary to address policies, procedures and problems related to their supervisory duties.

7. To enhance their supervisory skills, the Department requires Nurse Professionals III to attend a one week Supervisory I training course. The Department also sent them to the National Commission on Correctional Health Care conference with the directing physician of the prison infirmary.

8. The Nurse Professionals III approve and deny leave, including extended leave requests, by their subordinates. They schedule shifts for their subordinates. They plan, schedule and oversee weekly unit staff meetings. They approve time cards and maintain time records. They conduct annual performance appraisals for permanent employees and bi-monthly evaluations for probationary employees. Although subject to review by the Health Care Service Manager, appraisals performed by the Nurse Professionals III are generally adopted by the department.

9. The Nurse Professionals III have the authority to discipline subordinates by issuing verbal warnings. They make out incident reports and write up subordinate staff for improper behavior. They have the authority to effectively recommend disciplinary action for improper conduct. Nurse Professionals III have the authority to suspend employees for policy violations and, in fact, have exercised such authority in the past. General procedure calls for the infirmary staff to go directly to the Nurse Professional III to resolve issues that arise. Grievances filed by infirmary employees who are members of the bargaining unit are submitted to the Health Care Service Manager or the unit physician.

1 10. Nurse Professionals III participate on committees that
2 interview job applicants and make recommendations to the
3 department personnel administration concerning hiring for
4 openings in the infirmary. The Nurse Professionals III are
5 ultimately accountable for insuring that orientation of infirmary
6 staff is properly accomplished. They are responsible to see that
7 assignments carried out by their subordinates are properly
8 accomplished.

9 11. The Health Service Manager writes general policies for
10 the infirmary unit. However, Nurse Professionals III have the
11 authority to use their discretionary judgment in applying such
12 policies and can deviate from set policies if they find it
13 necessary. Nurse Professionals III are responsible for directing
14 daily assignments and prioritizing duties for infirmary
15 employees.

16 12. Although Nurse Professionals III spend approximately
17 25% of their time on supervisory duties, they do not have budget
18 responsibilities. The remainder of their time is spent in
19 providing direct patient care to inmates or performing other
20 staff nursing tasks.

21 13. RNs II and LPNs fill in two days per week as shift
22 supervisors for the Nurse Professionals III during their
23 scheduled days off. The RNs II and LPNs can turn in incident
24 reports on infirmary employees but are not authorized to use
25 disciplinary measures such as issuing warnings or suspensions.
26 RNs II and LPNs are not authorized to do performance appraisals.

27 14. RNs II and LPNs are not invited to attend supervisory
28 staff meetings with the Health Care Service Manager as are Nurse

1 Professionals III. The RNs II and LPNs are not provided
2 supervisory training as are the Nurse Professionals III. The
3 RNsII and LPNs assist with the orientation of new employees under
4 the direction of the Nurse Professionals III.

5 IV. DISCUSSION/RATIONALE

6 1. In the Montana Collective Bargaining Act supervisors
7 are excluded from the definition of public employees entitled to
8 bargain collectively and be members of recognized bargaining
9 units. Section 39-31-103(11), M.C.A. reads:

10 "Supervisory employee" means any individual having authority
11 in the interest of the employer to hire, transfer, suspend,
12 lay off, recall, promote, discharge, assign, reward,
13 discipline other employees, having responsibility to direct
14 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.

15 2. The Montana Supreme Court has approved the practice of
16 the Board of Personnel Appeals using federal court and National
17 Labor Relations Board (NLRB) precedent as guidance in
18 interpreting the Montana Collective Bargaining for Public
19 Employees Act as the state act is similar to the Federal Labor
20 Relations Act. As a result, the Board of Personnel Appeals has
21 historically followed NLRB and federal case precedents in
22 addressing labor issues. State ex. rel. Board of Personnel
23 Appeals v. District Court, 183 Mont. 233, 598 P.2d 1117, 103 LRRM
24 2297 (1977); Teamsters Local No. 45 v. State ex. rel. Board of
25 Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012
26 (1981); City of Great Falls v. Young (III), 683 P.2d 185, 119
27 LRRM 2682 (1984). It is undisputable that any one factor
28 contained in the definition of supervisor under

1 § 39-31-103(11), M.C.A. requires excluding that position from the
2 bargaining unit. In other words, an employee who possesses any
3 one of the iterated criteria qualifies as a supervisor. Montana
4 Federation of State Employees, MFT, AFL-CIO v. Department of
5 Women's Correctional Center, Board of Personnel Appeals, UC 4-90,
6 (7th Cir. 1992), NLRB v. Joe B. Foods, 953 F.2d 289, 294, 139
7 LRRM 2323, 2328 (quoting NLRB v. Ajax Tool Works, Inc.,
8 713 F.2d 1307, 1311, 113 LRRM 3762, 3764 (7th Cir. 1983)).
9 Children's Habilitation Ctr., Inc. V. NLRB,
10 887 F.2d 130, 131, 132 LRRM 2780, 2781 (7th Cir. 1989).

11 3. Several leading cases are controlling in an analysis of
12 whether a particular nursing position is "supervisory" and should
13 be excluded or retained in a bargaining unit. The United States
14 Supreme Court issued the controlling opinion on this subject in
15 NLRB v. Health Care & Retirement Corporation of America, 511 U.S.
16 571 (1994). In that case, the Court upheld the reversal of an
17 NLRB decision by the Court of Appeals for the Sixth Circuit that
18 had found an employer committed an unfair labor practice in
19 disciplining four nurses. The employer had argued before the
20 NLRB that the nurses were supervisors. The NLRB ruled that the
21 four nurses exercised supervisory authority that was directed at
22 the well being of patients and not in the interests of the
23 employer. The Supreme Court rejected the analysis used by the
24 NLRB and held that the senior ranking nurses, who were on duty
25 most of the time, ensured adequate staffing, made up the daily
26 schedules and assignments, monitored the work of nurses' aides,
27 and reported to upper management, were supervisors to be excluded
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1 from coverage under the National Labor Relations Act, 29 U.S.C. § 152(3)

2 4. Following NLRB v. Health Care & Retirement Corporation
3 of America, *supra*, the Court of Appeals for the Ninth Circuit
4 decided Providence Alaska Medical Center v. NLRB, 121 F.3d 548
5 (1997). In that case, the Court found that charge nurses did not
6 make up the schedules for other staff, but merely made patient
7 assignments within the schedule set by the supervisory nurse,
8 that charge nurses were often scheduled as the staff nurse and
9 that staff and charge nurses evaluated each other. Based on the
10 evidence the Court concluded that charge nurses were not
11 supervisors. The Court stated: "Our review of the record
12 indicates the Providence charge nurses are, in many ways, one of
13 the gang with the RNs on their shift." Providence, *supra*, at p.
14 554.

15 However, in Providence the Court noted that:

16 An employee responsibly directs others when the employee is
17 "answerable" to the employer for other employees' "discharge
18 of a duty or obligation." Arizona Public Service Co. v
19 NLRB, 453 F.2d 228, 231 (9th Cir.1971) (quoting NLRB v.
20 Fullerton Publishing Co., 283 F.2d 545, 549 (9th Cir.1960));
21 see also Meredith, 679 F.2d at 1337 ("in directing other
22 employees, a person is a supervisor only if he directs qua
23 employer or qua representative of the employer, such as a
foreman might do."); cf. Beverly California Corp. v. NLRB,
970 F.2d 1548, 1550 (6th Cir.1992) (RN supervisor found to
be a supervisor under the NLRA because she "was ultimately
responsible for nursing care in [her] units, and the
evidence showed that she was expected to oversee the work of
all [employees in the unit] to insure that proper health
care was being provided across the board.").

24 5. Courts have held that a person's status as the highest
25 ranking person on shift can be determinative of supervisory
26 status. Beverly California Corp. V. NLRB, 970 F 2d 1548, 1550
27 (6th Cir. 1992); NLRB v. St. Mary's Home, 690 F 2d 1062, 1067-69
28 (4th Cir. 1982).

1 6. The record shows that the Nurse Professional III
2 positions (Nos. 22691, 22672 and 22674) meet a number of the
3 criteria to be designated as supervisors pursuant to
4 §39-31-103 (11), MCA. These positions are required to use
5 independent judgment when deciding whether or not to deviate from
6 the standard policies of the infirmary unit set by the Health
7 Care Service Manager. The positions have the supervisory
8 authority to discipline infirmary employees when warranted,
9 including issuing verbal warnings and suspending subordinates for
10 unacceptable performance. The positions are empowered to approve
11 or deny leave requests from subordinates, including extended
12 leave. The department depends on individuals in the Nurse
13 Professional III positions in their supervisory capacities to
14 appraise performance of subordinate staff. The department
15 depends on the these positions to monitor and schedule work
16 assignments to insure each shift is adequately staffed and
17 appropriate care is provided for the inmates. Individuals in the
18 positions are appointed to panels to interview job applicants and
19 to make recommendations during the hiring process of prospective
20 employees for the department. The department also requires the
21 individuals in the Nurse Professional III positions to attend a
22 supervisor training course and participate in regular supervisory
23 meetings in order for them to be prepared to effectively carry
24 out their assigned supervisory roles. The Nurse Professional III
25 positions are held by the most senior ranking registered nurses
26 in the unit and are compensated at a higher salary level than
27 other staff members due to their supervisory obligations. While
28 other staff RNs and LPNs fill in as shift supervisors when

1 needed, it is the Nurse Professionals III who are ultimately
2 responsible to oversee that the supervision of the unit is
3 carried out. The above supervisory assignments of the positions
4 go beyond their other typical responsibilities in serving the
5 inmates in the infirmary within their licensure as registered
6 nurses. Therefore, the above supervisory responsibilities
7 assigned to the Nurse Professional III positions are neither
8 merely routine nor clerical in nature, but require the use of
9 continued independent judgment in their normal work activities.
10 This is sufficient to find that the Nurse Professional III
11 positions fall within the definition of supervisory employees
12 within the meaning of the law.

13 V. CONCLUSIONS OF LAW

14 1. The Board of Personnel Appeals has jurisdiction to hear
15 the unit clarification pursuant to § 39-31-202, M.C.A;
16 A.R.M. 24.26.640.

17 2. The Nurse Professional III positions (Nos. 22691, 22672
18 and 22674) perform duties that fall within the definition of
19 supervisory employees pursuant to § 39-31-103, MCA.
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VI. RECOMMENDED ORDER

IT IS ORDERED the bargaining unit at the Montana State Prison, which is represented by the Federation of Montana State Prison Professional Correctional Nurses, MFSE, MFT, AFT, AFL-CIO, be modified to exclude the Nurse Professional III positions (Nos. 22691, 22672 and 22674).

DATED this 8th day of January, 1999.

BOARD OF PERSONNEL APPEALS

By:

Michael T. Furlong
MICHAEL T. FURLONG
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 31, 1999. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

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

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

* * * * *

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:

Tom Burgess, Staff Director
Montana federation of State Employees
P.O. Box 6169
Helena, MT 59604-6169

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 means of the State of Montana's Deadhead mail service:

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DATED this 8th day of January, 1999.

Carol A. Larkin