

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

IN THE MATTER OF UNIT CLARIFICATION NO. 14-97:

STATE OF MONTANA, LABOR AND )  
EMPLOYEE RELATIONS BUREAU, )  
DEPARTMENTS OF ADMINISTRATION )  
AND JUSTICE, )

Petitioner, )

vs. )

MONTANA PUBLIC EMPLOYEES )  
ASSOCIATION, )

Respondent. )

**FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER**

\* \* \* \* \*

**I. INTRODUCTION**

An in-person hearing was held October 10, 1997, in conference room 3 of the Walt Sullivan Building, Helena, Montana. The Petitioner was represented by Bill Bentley, Labor Relations Specialist, Department of Administration. Respondent Montana Public Employees Association (MPEA) was represented by Carter Picotte, Attorney for the MPEA. Diana Reichenberg, incumbent Cashier Supervisor in position no. 17007, and Pam Wintrode, Department of Justice, gave sworn testimony. Joint Exhibits J-1 through J-6 and Petitioner's Exhibits S-1 through S-11 were admitted into the record without objection.

Upon completion of the hearing, parties agreed to the mutual exchange of post-hearing briefs, and the record was closed on November 6, 1997.

1 **II. ISSUE**

2 Whether Cashier Supervisor Position No. 17007 should be  
3 excluded from the existing bargaining unit at the Title and  
4 Registration Bureau, Motor Vehicle Division, Department of Justice.

5 **III. FINDING OF FACTS**

6 1. During a review of the organizational structure of the  
7 Cashier/Mail unit in the Title and Registration Bureau, Motor  
8 Vehicle Division, Department of Justice, the Petitioner anticipated  
9 the need for a line supervisor for the Cashier/Mail unit (hereafter  
10 Unit) and created a new supervisor position No. 17007. (Testimony  
11 Pam Wintrode; Exhibit S-4)

12 2. The Department of Justice (Department) promoted Diana  
13 Reichenberg (hereafter Reichenberg) into supervisor position No.  
14 17007 in September 1996. It advertised the opening for the  
15 position as a non-bargaining unit position (Exhibit S-3).  
16 Previously, Reichenberg had held an Administrative Support position  
17 No. 17008 in the Unit. (Testimony of Reichenberg)

18 3. The collective bargaining agreement (Exhibit S-1, p.1,  
19 Section 1) specifically excludes supervisory positions from  
20 inclusion in the bargaining unit.

21 4. Incumbent Reichenberg supervises four positions  
22 classified as Administrative Support, one of which was currently  
23 vacant at the time of hearing (testimony of Reichenberg).  
24 Reichenberg's supervisor position is a grade 9 while the  
25 administrative support positions are classified as grade 6. Entry  
26 salary for a grade 9 is \$16,630 while entry salary for a grade 6 is  
27 \$13,118. (Exhibits S-4, S-5, S-6, S-7; testimony of Reichenberg).

1           5.     Reichenberg considers herself a supervisor, and attended  
2 supervisory training on April 2, 1997 (Exhibit S-11; testimony of  
3 Reichenberg).

4           6.     Approximately 25% of Reichenberg's work time involves  
5 supervisory duties pertinent to the daily operations of the  
6 Cashier/Mail unit within the Records Section. These duties  
7 include, but are not limited to: establishing performance standards  
8 and evaluating staff; participating on interview committees for new  
9 positions; making recommendations on promotion, hiring and  
10 retention of personnel; and identifying and providing ongoing  
11 training to employees (Exhibit S-4). The remainder of her time is  
12 spent in assisting with the handling of incoming mail and issuing  
13 receipts and accounting for all funds received by the bureau.  
14 (Exhibit S-4; testimony of Reichenberg).

15           7.     In her position, Reichenberg does not have the final  
16 authority over all matters in her section, but has the authority to  
17 effectively recommend action to her immediate supervisor. If an  
18 unusual situation arises that requires attention by a higher  
19 authority, she refers the matter to the appropriate person. She  
20 has been in the position a short time, and has not been involved in  
21 a disciplinary action or discharge affecting her subordinates. She  
22 has approved time sheets and numerous requests for both sick leave  
23 and annual leave for her staff as reflected in March and April  
24 reports (Exhibits S-8 through S-10; testimony of Reichenberg).

#### 25     **IV.   DISCUSSION**

26           The parties jointly filed petition for unit clarification with  
27 the Board of Personnel Appeals (BOPA) for a determination whether  
28 the position in question is a supervisor as defined at § 39-31-

1 103(11), MCA. The definition of a supervisory employee found in  
2 the Montana statute closely resembles that found in the National  
3 Labor Relations Act. The Montana Supreme Court has approved the  
4 practice of BOPA using federal court and National Labor Relations  
5 Board (NLRB) precedents as guidelines for interpreting the Montana  
6 Collective Bargaining Act. State ex. Rel Board of Personnel  
7 Appeals v. District Court, 183 Mont. 223, 103 LRRM 2297 (1979);  
8 Teamsters Local No. 45 v. State ex. Rel Board of Personnel Appeals,  
9 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great  
10 Falls v. Young (III), 683 P.2d 185, 119 LRRM 2682 (1984).

11 Employees who are supervisors are exempt from both the state  
12 and federal definitions of public employee, primarily as a matter  
13 of policy, to improve the peacefulness of labor relations between  
14 employers and employees and to allow employers to have the  
15 undivided loyalties of these key employees. NLRB v. Beacon Light  
16 Christian Nursing Home, 825 F.2d 1076, 1078 (6th Cir. 1987).

17 Montana law § 39-31-103(11), MCA, defines a supervisory  
18 employee as:

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

28 Whether an employee is a supervisor depends on the duties  
performed by that employee for the organization. If Reichenberg  
has the authority to perform even one of the 12 listed activities  
with the use of independent judgment, or effectively recommend,  
then she should not be a member of the bargaining unit at the Title

1 and Registration Bureau. NLRB v. Konig, 79 F.3d 354, 357 (3rd Cir.  
2 1996), citing Health Care and Retirement Corp., supra, 114 S.Ct.  
3 1780; Manor West, Inc. V. NLRB, 60 F.3d 1195. 1197 (6th Cir. 1995).

4 Respondent argues that Reichenberg spends very little time in  
5 any supervisory capacity. Nevertheless, when an employee possesses  
6 at least one of the authorities under the supervisory statute, he  
7 or she is indeed a supervisor regardless of the frequency within  
8 which these responsibilities are exercised. It is well settled  
9 that if an individual is shown to exercise supervisory authority,  
10 the frequency with which she exercises that authority does not  
11 negate the conclusion that she is a supervisor. E and L Transport  
12 Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996). See also,  
13 Northeast Utility Service Corp v. NLRB, 35 F.3d 621, 624 (1st Cir.  
14 1994).

15 It is the function of the employee that is critical rather  
16 than the label or title. Therefore, it is a question of fact in  
17 each individual case as to whether the individuals involved are  
18 supervisors. The exercise of any one of these statutory  
19 supervisory criteria must be accomplished with at least some  
20 independent judgment and cannot be routine clerical or perfunctory.  
21 George C. Foss Company v. NLRB, 75 F.2d 1407, 118 LRRM 2746 (9th  
22 Cir. 1985).

23 The BPA outlined the following considerations for determining  
24 supervisory status in Billings Firefighters Local 521 v. City of  
25 Billings, UC 1-77:

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

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

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

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

5 Whether a substantial amount of the employee's time is  
6 spent doing work which is similar to the work of the  
7 subordinates.

8 Whether an unrealistic and excessively high ration of  
9 supervisors to employees would be created.

10 State government supervisors are subject to greater review  
11 than private sector counterparts. They have subjectively less  
12 freedom to exercise their authority by the nature of their  
13 employment; however, this does not lessen the ultimate authority  
14 delegated Reichenberg in her status as a supervisor. The record  
15 reflects that she effectively recommends concerning key criteria  
16 analyzed such as reviewing and approving time sheets. See, e.g.,  
17 Montana Public Employees Association vs. Department of  
18 Institutions, UC 9-88 (1989). Finally, employees have been found  
19 to be supervisors, even though restricted by federal guidelines and  
20 company policies where they were performing at least one of the  
21 twelve statutory criteria. Maine Yankee Atomic Power Co. v. NLRB,  
22 624 F.2d 347, 360 (1st Cir. 1980).

23 The Montana Board, like the NLRB, also considers certain  
24 secondary tests in determining supervisory status. The tests that  
25 have been considered are the following:

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

1 employees, not based solely on skill; (12) failure to receive  
2 overtime.

3 A review of the record establishes that the cashier supervisor  
4 position meets a sufficient number of the criteria to be designated  
5 as a supervisor. The position meets several of the primary tests,  
6 and, in addition, meets many of the secondary tests. For example,  
7 the incumbent is responsible for establishing weekly schedules,  
8 routing daily work, establishing and evaluating performance  
9 standards, approving time sheets, participating on interview  
10 committees, approving and denying leave requests and training new  
11 cashier unit employees.

12 **IV. CONCLUSIONS OF LAW**

13 1. The Board of Personnel Appeals has jurisdiction in this  
14 matter pursuant to the Montana Collective Bargaining for Public  
15 Employees Act, § 39-31-101, et seq., MCA.

16 2. Position 17007 held by incumbent Diana Reichenberg meets  
17 the definition of a supervisory employee and should be excluded  
18 from the collective bargaining unit pursuant to A.R.M. 24.26.630.

19 **V. RECOMMENDED ORDER**

20 It is **ORDERED** that position 17007 held by incumbent Diana  
21 Reichenberg be excluded from the collective bargaining unit.

22 DATED this 30<sup>TH</sup> day of January, 1998.

23  
24 BOARD OF PERSONNEL APPEALS

25 By: Gordon D. Bruce  
26 Gordon D. Bruce  
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 February 29, 1998.  
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 Carter Picotte, Attorney  
22 MPEA  
23 PO Box 5600  
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 Interdepartmental mail service.

Bill Bentley, Labor Relations Specialist  
Labor Relations Bureau  
State Personnel Division  
Room 130, Mitchell Building  
Helena, MT 59620

DATED this 30<sup>th</sup> day of January, 1998.

