



practical nurses, infirmity aides, and all other employees who are not supervisory, confidential or managerial.

A hearing was held on October 2, 2001 at the National Guard Armory in Deer Lodge, Montana, before Gordon D. Bruce. Paula Stoll, Chief of the State Labor Relations Bureau, represented the Petitioner. J. C. Weingartner, Attorney at Law, represented the Respondent. Dorothy Christensen, Jeff Bromley, Lorelei Hughley, Melanie Budd, and Anita Larner all testified on behalf of the Petitioner. Petitioner's Exhibits 1 through 26 were admitted into the record. The Respondent called no witnesses and offered no exhibits.

At hearing, Respondent filed a Motion In Limine to prohibit the application of the secondary test that has been used in determining whether an employee functions in a supervisory capacity. The motion is addressed in this decision.

Upon completion of the hearing, the Hearing Officer gave the parties opportunity to file post\_hearing briefs, and parties agreed to the mutual and simultaneous exchange of their briefs. The record was deemed closed on November 28, 2001.

## II. RULING ON MOTION IN LIMINE

The Union's motion to exclude evidence concerning the secondary tests is not only without merit but also moot as it applies to these four positions. The NLRB and the Board of Personnel Appeals have used these secondary tests in "borderline" cases and such usage has been approved by both state and federal courts. The secondary tests have not been used to the exclusion of the primary tests outlined in Montana law but to supplement those tests. The four positions at issue here, however, are not "borderline" cases. They in fact meet many of the Act's primary tests and the Department of Corrections has met its burden of proof under the primary tests. The Motion in Limine is denied.

## III. ISSUE

Whether Positions 22134, 11015, 11056 and 22101 should be excluded from the bargaining unit based on supervisory authority.

## IV. FINDINGS OF FACT

1. The MEA-MFT is a "labor organization" within the meaning of Section 39-31-103(6), MCA.

2. The Montana Department of Corrections is a "public employer" within the meaning of Section 39-31-103(10), MCA.

3. "First-line" or "unit" supervisors at Montana State Prison (MSP) are required to attend an initial 40-hour supervisory course offered by the Department of Correction's Professional Services Division. The course includes effective communication, problem-solving, progressive discipline, recruitment and selection, performance evaluation, and other pertinent matters related to employment law and reporting requirements.

4. Unit supervisors at MSP have primary responsibility for the recruitment and selection of employees under their chain of command. When a position becomes vacant, the unit supervisor will meet with staff in the personnel office and review the position description to make sure it is accurate. If the supervisors need to make a change in the duties and responsibilities or minimum qualifications, those changes are made before the vacancy is posted. The supervisors also decide whether the position is to be posted internally or externally, and are responsible for developing the interview questions.

5. Unit supervisors are responsible for screening applications and during the screening process refer to the qualifications that are outlined in the position description. The supervisors then notify the personnel office of the applicants chosen for interviews and that office schedules the interviews.

6. Unit supervisors select interview committees, usually made up of three people, including the supervisor. These committees interview applicants and attempt to arrive at a consensus approach to rating applicants after the interviews. The unit supervisor's opinion overrides other committee members' opinions if consensus is not achieved.

7. Unit supervisors notify the personnel office of the final selection. The personnel office then conducts reference checks and a criminal background check using information available on-line through the National Crime Information Center (NCIC). In the event an NCIC check reveals a criminal conviction, the personnel office notifies the unit supervisor who in turn decides whether MSP still wishes to hire the applicant.

8. Neither the warden nor the deputy wardens closely review the hiring decisions made by MSP's unit supervisors. There may have been, at most, two occasions in five years when the warden reviewed a hiring decision.

9. The procedure for authorizing leave varies depending on requirements of the office and the collective bargaining agreement. All unit supervisors, however, are responsible for approving leave requests and certifying time sheets for workers they supervise. Some supervisors require employees to obtain advance written approval for leave. Others orally approve requests and subsequently provide written authorization when they approve time sheets, usually after the leave has been taken.

#### **Word Processing Supervisor (Position 22134)**

10. Position 22134 is classified as a grade 10 word processing supervisor. The incumbent, Dorothy Christensen, has held that position for more than three years. Christensen's position is classified as a grade 10 because of her supervisory responsibilities. Her primary work responsibilities include training, assigning, instructing, and supervising the work of the word processing technicians.

11. The MSP processing center provides technical support services to all departments in MSP. The center employs two grade 8 word processing technicians who are subordinate to Christensen. Christensen's supervisor is Cheryl Coughlin, administrative assistant to the warden. She seldom consults with Coughlin, but they may meet about once a month. Christensen attended the 40\_hour supervisory training course offered by the Department of Corrections shortly after she began work as the center's supervisor.

12. When a word processing technician vacancy occurs, Christensen prepares the job posting, develops the interview questions, determines the rating system, and screens applicants. Christensen picks out important parts that pertain to the job and screens the applications according to those requirements. She is also responsible for choosing members for an interview panel and scheduling the interviews. She tries to staff the interview panels with people familiar with word processing.

13. Christensen seeks advice from Cynthia Davenport in MSP's personnel office if she has any questions about the hiring process. On occasion, Christensen has asked Davenport to serve on the interview panel.

14. During the interview process, members of the three-person interview panel take turns asking the applicants questions. When the interview is completed, the members compare notes and try to reach a consensus on ratings. Christensen has the authority to make the final decisions if panelists cannot reach a consensus.

15. Christensen refers the top candidate to Davenport who in turn completes a criminal background check. Davenport consults with Christensen if the background check reveals prior criminal convictions. If the candidate's record is clear, Davenport refers Christensen's recommendation to the deputy warden or warden for final approval.

16. Christensen has hired approximately four word processing technicians in her three and one\_half years as word processing supervisor. All of Christensen's prior recommendations have been approved. Coughlin does not review Christensen's hiring recommendations.

17. Christensen is responsible for independently approving all vacation and sick leave requests for the word processing technicians. She considers coverage and workload when she reviews annual leave requests. Coughlin does not review leave requests for word processing technicians.

18. Christensen is responsible for independently appraising the work of the word processing technicians. She uses formal and informal methods. She issues "positive action reports" to acknowledge exemplary work, which are filed in the worker's personnel file. She is also responsible for administering formal performance evaluations. She uses the position descriptions as the basis for those evaluations. She determines the criteria, rates workers' performance against the criteria, meets with workers to review their performance ratings, and identifies future performance goals. Coughlin does not review the evaluations Christensen administers.

19. Christensen is responsible for administering corrective discipline within the word processing unit. Christensen has faced one major disciplinary issue during her tenure as word processing supervisor. Christensen decided to extend a worker's probationary period after her attempts at corrective counseling failed to produce the desired behavioral change. However, the worker resigned before Christensen took further action.

#### **Warehouse Manager (Position 22101)**

20. Position 22101 is classified as a grade 13, warehouse manager. Jeff Bromley held the position until April 2001, and he testified as to the position's supervisory authority.

21. Position 22101 is classified as a grade 13 because of the supervisory responsibilities assigned. The incumbent oversees all aspects of MSP's warehouse, including receiving, storing and distributing goods and services. The warehouse manager's primary duties include training, assigning, instructing and supervising the work of three truck drivers (grade 7 on the state's blue collar pay plan) and a grade 11 warehouse foreman.

22. Bromley reported to the operations unit manager, a grade 18 position then held by Ted Davis. Davis did not review Bromley's hiring decisions, leave approvals, performance appraisals, or oral warnings. Bromley attended the Department of Corrections' 40-hour supervisory training course in February 1999.

23. When Bromley held the warehouse manager position, he wrote the position descriptions for the warehouse foreman and four warehouse workers, and he developed the interview questions for new applicants. Bromley worked with Cynthia Davenport to fill vacant warehouse positions. Davenport prepared the job postings based on the position descriptions Bromley wrote, and she scheduled applicant interviews. He and Davenport screened applications together. When finalists were chosen for interviews, Bromley and other panelists that he selected performed the job interviews. He sometimes asked Davis to sit on the interview panel, but more often he asked Davenport. Davenport typically asked the questions, while Bromley and the other panelist listened and rated answers. Once the interview ended, panelists evaluated answers and decided final ratings. Bromley's opinion overrode other panelists if any disagreements arose. Once the top candidate was selected, Bromley submitted a recommendation to the personnel office.

24. Bromley's recommendations were subject to a criminal background check by Davenport. Davenport consulted with Bromley if a background check revealed prior criminal convictions. If not, Davenport referred Bromley's recommendations to a deputy warden or the warden. Bromley's recommendations were always approved. Davis did not review Bromley's hiring recommendations. If Davis served on the interview panel, his role would be similar to that of other panelists; Bromley's decision carried more weight.

25. Bromley was responsible for independently approving all vacation and sick leave requests for all four workers. He liked to know why employees were requesting time off so he could balance coverage against need. Davis did not review leave requests approved by Bromley.

26. Bromley was responsible for independently appraising the work of all four workers. He conducted formal appraisals of employees three times within their six-month probationary period and annually thereafter. Davis did not review any of the formal appraisals completed by Bromley.

27. As warehouse manager, Bromley was also responsible for recommending disciplinary action up to and including termination, after consulting with his supervisor. He independently administered oral and written warnings within the warehouse unit, and he issued one worker three oral warnings. In that case, the warnings involved the employee's hygiene. Bromley considered the worker's length of service in meting out discipline as the worker had worked for the state for 25 years. Davis never reviewed Bromley's corrective action.

**Classification Specialist (Position 11015)**

28. Lorelei Hughley has held position 11015, classification specialist, grade 13, since October 1996. Hughley oversees the offender classification program for all the state penal institutions (Montana State Prison, regional correctional facilities and private prisons). She had previously been a medical records supervisor.

29. The offender classification program was restructured one year ago. Hughley assumed direct supervisory responsibility over position 11056, grade 12, classification placement supervisor position, and indirect supervisory responsibility over three grade 11 database technician positions. Hughley's position was reclassified to a grade 13 due in part to the supervisory authority assigned the position. Hughley does not work in the same office with her staff, and is frequently out of the office traveling to other institutions.

30. The position description for Hughley, which was approved by her bureau chief, Candyce Neubauer, on October 4, 2000, indicates that Hughley "Supervises the Classification Placement Unit to maintain consistent, accurate handling of classification reviews using knowledge of the classification system and supervisory techniques." Hughley attended the Department of Corrections' supervisory training course in November 1999.

31. Hughley is responsible for hiring the classification placement supervisor position, which is now open. The position became vacant in September and will be filled within the next few months. Hughley will determine the minimum qualifications, selection criteria, and interview questions, and select two other people to serve on an interview panel. She will then independently select applicants for interviews and notify personnel of her selections.

32. The personnel office will schedule interviews. During the interviews, panelists will take turns asking questions and individually score applicants' answers. Once the interviews are completed, panelists will compare notes and, through consensus, determine an overall rating. Hughley will determine the rating if the panelists cannot reach consensus. Hughley will then make a hiring recommendation to personnel. Neubauer is not expected to review Hughley's recommendation as her prior recommendations have been approved.

33. Hughley is responsible for approving leave requests for the classification placement supervisor. She asks that the requests be submitted sufficiently in advance to consider the needs of the whole department and any prison-wide activities.

34. Hughley is responsible for independently conducting performance appraisals for the classification placement supervisor. She decides what aspects of the work will be appraised, she keeps a log noting strengths and weaknesses to refer to when she prepares the formal performance appraisal, and she rates the overall performance. Neubauer does not review the performance appraisals prior to their completion nor does she review leave requests for the classification placement supervisor.

35. Hughley is responsible for administering corrective discipline to the classification placement supervisor. She would provide oral warnings, written warnings, and recommendations to suspend or terminate. One incident occurred where she notified the placement supervisor of excessive phone use within the unit. With that exception, Hughley has never had cause to discipline an employee.

#### **Classification Placement Supervisor (Position 11056)**

36. Melanie Budd held the position of classification placement supervisor until September 2001. Her position was created to ensure direct day-to-day supervision over the database function of the classification program because Hughley, her supervisor, does not work in the same office and is frequently out of the office traveling to other institutions.

37. The classification placement supervisor position is classified at a grade 12 because of the supervisory responsibilities assigned the position. The position description dated July 6, 2000, states that, "The incumbent performs supervisory duties for the Data Base Technicians at Montana State Prison."

38. Budd exercised independent supervisory responsibility over three database technicians. She was responsible for recruiting and selecting database technicians. Her process



was similar to the other supervisors previously discussed, in that she determined the selection criteria, selected the interview questions, and screened applications. Budd worked through the personnel office to get interviews scheduled. She selected other interview panel members. Panel members took turns asking questions, rated answers individually, and compared those ratings once the interview was completed. If consensus was not reached, Budd's decision prevailed. Hughley may have reviewed the first database technician hiring, but Hughley did not review the last two.

39. Budd was also responsible for approving the database technicians' leave requests. She considered coverage and seniority when reviewing those requests. Hughley did not routinely review those leave decisions.

40. Budd independently appraised the performance of the database technicians. She formally appraised them within their six-month probationary period and then annually thereafter. The criteria for rating performance was developed before Budd took the classification placement supervisor position, but she independently assessed the level of performance for each criterion, from "outstanding" to "unacceptable." She asked Hughley to review the first performance appraisal she conducted. After that, she conducted performance appraisals without review from Hughley.

41. Budd was also responsible for administering corrective discipline. If the need arose, Budd was expected to issue oral and written warnings and recommend more severe disciplinary action such as suspension or termination. She gave one oral warning during her tenure as classification placement supervisor. One of the technicians started regularly showing up late for work and Budd was prepared to issue a warning letter if the problem was not corrected.

## V. DISCUSSION

The Montana Department of Corrections seeks a determination that certain employees should be excluded from the collective bargaining unit represented by the MEA-MFT because of their status as supervisors.

### **Supervisory Exclusions**

Section 39-31-103(9)(b), MCA, excludes supervisors from the definition of public employee. Section 39-31-103(11), MCA, excludes all supervisory employees from coverage by the Public Employees Collective Bargaining Act. It defines a "supervisory employee" as:

[A]ny individual having authority in the interest of the employer to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct 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 that requires the use of independent judgment.

The definition of a supervisory employee found in the Montana statute closely resembles that found in the National Labor Relations Act. Thus, in determining supervisory status, the Montana Board of Personnel Appeals has historically followed the National Labor Relations Board (NLRB) and federal court precedent (*State ex. rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *Teamsters Local No. 45 v. State ex. rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981)).

The Union argues that the incumbents in these positions spend very little time in any supervisory capacity and lack any decision-making authority. However, like the NLRB, the Board of Personnel Appeals has ruled that to be considered a supervisor, a person need not meet all the criteria listed in the Act. In fact, the existence of any one of those criteria is sufficient to confer supervisory status, regardless of how frequently it is performed (*George C. Foss Company v. NLRB*, 752 F.2d 1407, 118 LRRM 2746 (9th Cir. 1985); *Unit Determination 15-87*; *Unit Clarification 9-88*; *Unit Clarification 9-94*).

The exercise of one or more of the 12 criteria provided for under § 39-31-103(11), MCA, is the focal point for assessing the supervisory status of an individual. In borderline cases, however, the Board has adopted certain secondary tests to determine whether an employee is a supervisor (*Unit Determination 6-88*). These tests were developed by the NLRB (*P. Hardin, The Developing Labor Law*, 3rd Ed., 1992; *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 122 LRRM 3163 (9th Cir. 1986); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 104 LRRM 2902 (1st Cir. 1980); *American Indus. Cleaning Co.*, 291 NLRB 399, 131 LRRM 1277 (1988)). In *Unit Determination 6-88*, the Board of Personnel Appeals recognized and applied such secondary tests. In that decision, the hearing examiner cited tests such as:

[T]he employee being designated a supervisor; the fact that he is regarded by himself or others as a supervisor; the exercise of privileges accorded only to supervisors; attendance at instructional sessions or meetings held for supervisory personnel; responsibility for a shift or phase of operation; authority to interpret to transmit employer's instructions to other employees; the responsibility for inspecting the work of others; instruction of other employees; authority to grant or deny leave of absences to others; responsibility for reporting rule infractions; keeping of time records on other employees; receiving

substantially greater pay than other employees, not based solely on skill, and failure to receive overtime. . . .

Further, the Montana's First Judicial District Court recently affirmed the practice of the Board of Personnel Appeals of supplementing the supervisory definition found under Section 39-31-103(11), MCA, with the NLRB's secondary tests (Unit Clarification 10-97; Cause No. BDV 99-166; April 2001). The Court found that the hearing officer did not err when he applied the Board's "secondary tests" to designate the employees as supervisors.

As to the independence of supervisors in state government, the Board held in *Montana Public Employees Association v. Department of Institutions*, UC 9-88 (1989) that:

In state government there is perhaps a more defined chain of command in terms of hiring and firing decisions than there is in the private sector. For this reason there are constraints in terms of review placed on all of the positions that the employer contends should be excluded from the unit. Hiring and firing practices of supervisors at Montana Developmental Center are reviewed just as they are for supervisors throughout state government. However, for the positions in question the employer has clearly demonstrated that the positions do hire and fire or at the very least have a significant and substantial involvement in the hiring and firing decisions. Their involvement is far more than routine or clerical, they do exercise independent judgment.

A determination of whether the supervisory responsibilities assigned to employees of state government are routine or clerical and carried out with or without independence requires more than a showing that a superior reviews the results of supervisory actions. However, if the positions at the very least have a significant and substantial involvement, they meet the definition of a supervisory employee and must be excluded from bargaining units.

A review of the record establishes that the positions held by Christensen, Bromley, Hughley, and Budd meet a sufficient number of criteria to be designed as supervisors and to be excluded from the bargaining unit. The four positions meet several of the 12 primary tests of a supervisory employee, either directly or through "significant and substantial involvement," and they meet all but a few of the secondary tests.

### **The twelve tests**

The record establishes that Christensen, Bromley, Hughley, and Budd each trained unit subordinates, assigned work to unit subordinates, reviewed work performed by unit subordinates, directed unit subordinates in the performance of that work, and initiated corrective action when the work was not done correctly. The record further establishes that Christensen, Bromley,

Hughley, and Budd assumed primary responsibility for hiring and disciplining unit subordinates. While most recommendations came from a three-person hiring committee that included the unit supervisors, the recommendations of these four unit supervisors would override other committee members if disagreements arose. Further, the record shows that these recommendations, whether they came from the committee or the unit supervisor, were seldom if ever contradicted by the personnel office, a deputy warden, or the warden. The record also shows that these unit supervisors' involvement in initiating discipline is characteristic of unit supervisors throughout state government in that they are each given authority to initiate informal disciplinary action. When those measures fail, their recommendations for formal disciplinary actions are given significant weight.

Although these supervisors may not have the final and ultimate authority in the above situations, neither precedent nor case law require that they have such authority. Nor does the record show that the tasks performed by them are "merely routine, clerical, perfunctory or sporadic" as in *Frederick's Foodland, Inc.*, 247 NLRB 284, 291 (1980).

The relevant consideration is "effective recommendation" or "control" rather than final authority, notwithstanding the Union's assertions that some of these unit supervisors spend a substantial amount of time on production work or that there appears to be a disproportionate number of supervisors in the classification program. The NLRB has ruled in similar cases that such workers should be excluded from the bargaining unit if they have considerable authority over the employees under them. *Operating Engineers, Local 478*, 283 NLRB No. 114, 126 LRRM 1068 (1987). Further, the NLRB has found that supervision of merely one employee is a sufficient basis for exclusion from the bargaining unit provided that statutory indicia of supervisory status is met. *Holland & Son*, 237 NLRB 263, 98 LRRM 1586 and 99 LRRM 1432 (1978).

### **The secondary tests**

The record also establishes that the positions held by Christensen, Bromley, Hughley, and Budd are responsible for overseeing the work of a specialized unit. In addition to the responsibilities mentioned above, the record established that these individuals attended instructional courses designed for supervisors only, approved and denied leave requests for unit subordinates, maintained and certified time records for unit subordinates, and were paid more than unit subordinates based on their supervisory duties. Again, the record shows that these

individuals were solely responsible for the performance of these duties with little or no review from their supervisors. Their involvement required the use of independent judgment that was far more than routine or clerical in nature.

## VI. CONCLUSIONS OF LAW

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

2. Word Processing Supervisor Position 22134 (currently filled by Dorothy Christensen), Warehouse Manager Position 22101 (formerly held by Jeff Bromley), Classification Specialist Position 11015 (currently filled by Lorelei Hughley), and Classification Placement Supervisor Position 11056 (formerly held by Melanie Budd) are not appropriately included in the bargaining unit pursuant to Section 39-31-103(9)(b), MCA, that excludes supervisors from the definition of public employee, and Section 39-31-103(11), MCA, that excludes all supervisory employees from coverage by the Public Employees Collective Bargaining Act.

## VII. RECOMMENDED ORDER

The request of the Montana Department of Corrections that the bargaining unit at Montana State Prison, which is represented by MEA-MFT, be modified to exclude Positions 22134 (currently filled by Dorothy Christensen), 22101 (formerly held by Jeff Bromley), 11015 (currently filled by Lorelei Hughley), and 11056 (formerly held by Melanie Budd) is hereby granted.

DATED this 4th day of January, 2002.

BOARD OF PERSONNEL APPEALS

By: /s/ GORDON D. BRUCE

GORDON D. BRUCE

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 28, 2002. 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 59624\_6518  
\* \* \* \* \*

#### 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:

J. C. Weingartner  
Attorney at Law  
222 Broadway  
Helena, MT 59601

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 Interdepartmental mail service.

Paula Stoll, Bureau Chief  
Labor and Employee Relations/DOA  
P.O. Box 200127  
Helena, MT 59620\_0127

DATED this 4th day of January, 2002.

/s/ SANDY DUNCAN