

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-2004:

MONTANA PUBLIC EMPLOYEES) Case No. 551-2004
ASSOCIATION,)
)
Labor Organization,)
)
and)
)
MONTANA DEPARTMENT OF)
PUBLIC HEALTH AND HUMAN)
SERVICES, HEALTH POLICY AND)
SERVICES DIVISION, HEALTH)
CARE RESOURCES BUREAU,)
)
Employer.)

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

* * * * *

I. INTRODUCTION

On September 8, 2003, the parties filed a joint petition for unit clarification, requesting a determination on whether the positions held by Katherine Wilkins (position 04912) and Jennifer Wise (position 07035) were properly included in the unit established for collective bargaining for certain employees in the Department of Public Health and Human Services (DPHHS), Quality Assurance and Health Policy Services Divisions. On September 30, 2003, DPHHS filed a response in which it contended that the positions were not properly included in the unit because they had managerial/supervisory responsibilities. On December 18, 2003, Paul Melvin, agent for the Board of Personnel Appeals, issued an order transferring the case to the Department's Hearings Bureau for a hearing.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on February 26, 2004. Stacey Bird represented the Montana Public Employees Association (MPEA). Arlyn L. Plowman represented the employer. Jackie Forba, Mary Noel, and Ron Ostrander testified as witnesses in the case. Exhibits A through E were admitted into evidence by stipulation.

The parties filed post-hearing briefs in the case on March 26, 2004.

II. ISSUE

The issue in this case is whether a unit established for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202. Specifically, the issue is whether Katherine Wilkins (position 04912) and Jennifer Wise (position 07035) are supervisory employees and therefore excluded from the Montana Collective Bargaining for Public Employees Act's definition of public employee under Mont. Code Ann. § 39-31-103(9)(b).

III. FINDINGS OF FACT

1. The Montana Public Employees' Association (MPEA) is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).
2. The Department of Public Health and Human Services is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).
3. On May 14, 1996, the Board certified the MPEA as the representative for collective bargaining of a unit of the following employees in the Quality Assurance and Health Policy Services Division of DPHHS:

All administrative officers, specialist and support staff, human service specialists, auditors, program officers and specialists, fiscal specialists, nutritionists, technicians, training and health services specialists, health sanitation specialists, health specialists, health facility surveyors, hearings officers, financial investigators, public health educators, information and data base specialists, permitting technicians, research specialists, statisticians, eligibility examiners and construction consultants. . . , excluding those employees in supervisory, managerial or confidential positions.

4. In 2003, the Health Policy and Services Division was split into two divisions, the Child and Adult Health Resources Division, and the Public Health and Safety Division. One of the bureaus in the Child and Adult Health Resources Division is the Health Care Resources Bureau.

5. At the time of the certification of the unit, positions 04912 and 07035 were included in the unit.

6. During the fall of 2002 and winter of 2003, the Eligibility, Resource, and Referral section of the Health Care Resources Bureau was restructured. Accordingly, some positions were reclassified and duties and responsibilities were reassigned. Changing federal and state rules, the Children's Health Insurance Program (CHIP) state plan amendment, program policies and procedures, and continuing state fiscal limitations necessitated this reorganization.

7. The reorganization and restructuring of the Health Care Resources Bureau required that the position descriptions for positions 04912 and 07035 be updated to reflect the managerial/supervisory responsibilities assigned to those positions.

8. Mary Noel is the chief of the Health Care Resource Bureau. Prior to the reorganization, the Bureau had three sections. One section was eliminated in the reorganization. A new section called the CHIP section was established. Jackie Forba became the supervisor of the CHIP section.

9. DPHHS employed Katherine Wilkins as an information analyst manager in position 04912 in the Outreach, Information Management, and Support section. Her position was moved to the CHIP section in the reorganization. DPHHS also amended her position description to include the following:

Personnel Management

- Directly supervises and provides oversight, direction, consultation, guidance, and assignment of duties to Claims Examiner/Analyst (position # 4913). Responsibilities include hiring, evaluation, training, progressive discipline, and time and attendance reporting.
- Establishes general work assignments for Program Specialist [sic], monitors work plans for completion of assignments, and evaluates the final results.
- Reviews work of the Claims Examiner/Analyst for accomplishment of program objectives. Provides technical assistance and provides interpretation of federal and state policies.

The position description provided that 10% of the incumbent's time would be spent on personnel management. DPHHS made no other changes of substance to the position description.

10. DPHHS employed Jennifer Wise as a program specialist - outreach in position 07035 in the Outreach, Information Management, and Support section. In the reorganization, her position was also transferred to the CHIP section. Following the reorganization, DPHHS amended her position description in a manner identical to the changes made to position 04912, except that Wise was to supervise a program specialist rather than a claims examiner/analyst.

11. After the reorganization, Wilkins and Wise had responsibility for hiring, performance evaluation, and discipline of the employees who reported to them. They could initiate a hiring process by asking the human resource office to recruit for a vacant position. Following a process that included screening of applications by the human resource office, Wise participated in the hiring of a new subordinate as part of the interview panel for the hiring process. Wilkins and Wise had the authority to address the grievances of their subordinates, although neither had actually addressed a grievance prior to the hearing in the case. Both had the authority to make effective recommendations concerning the discipline and discharge of employees, although neither had actually made such a recommendation prior to the hearing.

IV. DISCUSSION

DPHHS seeks a determination that Wilkins and Wise should be excluded from the collective bargaining unit for DPHHS workers on the grounds that they are supervisory employees.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes “supervisory employee” from the definition of “public employee” (Mont. Code Ann. § 39-31-103(9)), a supervisory employee does not have the rights guaranteed by Mont. Code Ann. § 39-31-201, and is not appropriately included in a unit for collective bargaining purposes.

Mont. Code Ann. § 39-31-103(11) defines supervisory employee as “any individual having authority in the interest of the employer to hire, transfer, suspend,

lay off, recall, 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 but requires the use of independent judgment.”

In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185. Further, supervisors are also excluded from bargaining units under federal law, and the definition of supervisor in the federal law is almost identical to the definition in the state law.

The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. *NLRB v. Bakers of Paris, Inc.* (9th Cir. 1991), 929 F.2d 1427, 1445. It is well settled that not all, or even a large number, of the statutory indicia of supervisory status are necessary to establish that an employee is a supervisor. The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria. *E and L Transport Co. v. NLRB* (7th Cir. 1996), 85 F.3d 1258, 1269. However, possession of one of the enumerated powers confers supervisory status only when the employee performs one of the powers using independent judgment. *NLRB v. S.R.D.C., Inc.* (9th Cir. 1995), 45 F.3d 328, 332. The law distinguishes between true supervisory personnel vested with “genuine management prerogatives” and employees such as “straw bosses, lead men, and set up men” who enjoy the protection of the labor relations laws, even though they perform minor supervisory duties. *NLRB v. Bell Aerospace Co.* (1974), 416 U.S. 267, 280-81.

DPHHS established, through the testimony of Mary Noel, the chief of the Health Care Resources Bureau, and Jackie Forba, supervisor of the CHIP section, and through the documentary evidence, that Wilkins and Wise are supervisors, based on the following discussion of the statutory factors. Although the employer’s evidence was conclusory in nature, MPEA presented no evidence to rebut that presented by DPHHS. Neither party called Wilkins or Wise, who might have been able to provide a more complete picture of their authority and responsibility.

Hiring

The testimony established that Wilkins and Wise could initiate hiring processes and participate in selection panels to fill the positions they supervised. This demonstrates, at a minimum, authority to effectively recommend hiring decisions using independent judgment. MPEA contended that Wilkins and Wise do not truly have hiring authority because they receive assistance from the human resource office in many aspects of the selection process and because they are not the sole or final authority in hiring decisions. The fact that a supervisor receives assistance from the human resource office in screening applications or any other aspect of personnel management does not show that the supervisor lacks authority. Further, the statutory definition clearly states that to be a supervisor, the employee need not be the sole or final authority, but only have the authority to effectively recommend personnel action. Wilkins and Wise have such authority.

Discharge, discipline and adjustment of grievances

Although neither Wilkins or Wise had actually been involved in discipline or discharge of an employee, the unrebutted testimony of Forba was that they had the authority to do so or to effectively recommend discharge and disciplinary actions. Similarly, although they had not addressed grievances of their subordinates, Forba testified that they had the authority to do so. MPEA again emphasized the existence of a chain of command and assistance from the human resource office on these points as demonstrating lack of supervisory authority. For the reasons discussed in the paragraph on hiring, above, these arguments are without merit.

Assignment and direction

The strongest factors supporting a determination that Wilkins and Wise are supervisors are assignment and direction. The position descriptions clearly identify assignment and direction of their subordinates as duties of the two employees. The evidence contains no suggestion that they lack independent judgment in the performance of these duties. Further, Wilkins and Wise have responsibility for performance appraisal. Although the ability to evaluate employees is not one of the statutory indicia of supervisory status and by itself is insufficient to prove supervisory status, as an aspect of assignment and direction it shows that Wilkins and Wise are supervisors in this case.

Transfer, suspension, layoff, recall and reward

The record contains no evidence on the authority of Wilkins and Wise in these areas, except to the extent that suspension may be encompassed within the area of discipline, addressed above.

Summary

MPEA contends that Wilkins and Wise are not supervisors because: 1) their supervisory duties are only a small portion of their duties, 2) they do not perform all of the duties of a supervisor, 3) their actions are subject to review by their supervisors, 4) their hiring decisions are subject to departmental procedures and guidelines, and 5) they are not the final authority in matters of hiring, discipline, and discharge. These are essentially legal arguments rather than factual disputes. However, the law is clear that if an employee has the authority to perform only one of the statutory criteria in the interest of the employer, using independent judgment, that employee is a supervisor for purposes of the law. DPHHS has proven that Wilkins and Wise, exercising independent judgment, have the authority to assign and direct the work of their subordinates, to adjust grievances, and to make effective recommendations concerning hiring, discipline, and discharge. MPEA has failed to put forth any evidence from which a contrary conclusion could be reached. Because of this, the only possible conclusion is that Wilkins and Wise are statutory supervisors and not properly included in the collective bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. The information analyst manager and program specialist - outreach (positions 04912 and 07035) in the CHIP section of DPHHS are supervisors pursuant to Mont. Code Ann. § 39-31-103(11). As such, they are not properly included in the unit established by the Board for collective bargaining purposes.

VI. RECOMMENDED ORDER

The information analyst manager and program specialist - outreach (positions 04912 and 07035) are supervisors and not properly included in the unit established by the Board for collective bargaining purposes.

DATED this 12th day of April, 2004.

BOARD OF PERSONNEL APPEALS

By: *Anne L. MacIntyre*
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than May 5, 2004. This time period includes the 20 days provided for in Admin. R. Mont. 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 a true and correct copy of the foregoing document was, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Stacey Bird, Field Representative
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604-5600

The undersigned hereby certifies that a true and correct copy of the foregoing document was, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental mail service.

Arlyn Plowman, Labor Relations Specialist
Department of Administration
P.O. Box 200127
Helena, MT 59620-0127

DATED this 12th day of April, 2004.

Sandy Duncan