

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 10-2005:

MONTANA DEPARTMENT OF) Case No. 1191-2005
CORRECTIONS - MONTANA)
STATE PRISON AND MONTANA)
CORRECTIONAL ENTERPRISES,)
)
Petitioner,)
)
vs.)
)
FEDERATION OF MONTANA)
STATE PRISON EMPLOYEES,)
MEA-MFT,)
)
Respondent.)

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

I. INTRODUCTION

On December 9, 2004, the Montana Department of Corrections filed a petition for unit clarification with the Board contending that the positions of admissions manager and records supervisor should not be included in the Federation of Montana State Prison Employees, MEA/MFT, bargaining unit representing all employees of the Montana State Prison and Montana Correctional Enterprises. That unit is classified as correctional officers, correctional technicians, recreation specialists, maintenance workers, mental health technicians, psychology specialists, food service workers, registered nurses, licensed practical nurses, infirmary aides, and all other employees who are not supervisory, confidential, or managerial, or are not covered by a separate bargaining agreement. The petition contended that the employees in question were supervisory employees.

On December 13, 2004, the Board served a copy of the petition on the Federation of Montana State Prison Employees. On January 3, 2005, the Federation of Montana State Prison Employees filed a response to the petition in which it denied that the unit clarification petition should be granted, stating that nothing in the record established that either employee was a supervisory employee within the meaning of Mont. Code Ann. § 39-31-103(11).

On January 28, 2005, Vicki Knudsen, Board agent, issued an order that a hearing should be held in the case. Staff for the Board transferred the case to the Hearings Bureau on February 2, 2005.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on April 27, 2005. Ruth Anne Hansen represented the petitioner, Montana Department of Corrections. Richard Larson represented the respondent, Federation of Montana State Prison Employees, MEA/MFT. At the commencement of the hearing, the respondent withdrew its contest to the admissions manager position held by Jerry Beasley and accepted the request that the position be excluded from the bargaining unit. Denise McNeeley, Sylvia Dubuisson, Cynthia Davenport, and Mike Mahoney testified as witnesses in the case. Exhibits 1, A, and B, were admitted into evidence, pursuant to the stipulation of the parties. Exhibits 5, 7, and 8A were also admitted.

The parties filed post-hearing briefs on May 26, 2005. At that time, the case was deemed submitted for decision.

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 the positions of admissions manager and records supervisor are properly included in the unit for which the exclusive representative is the Federation of Montana State Prison Employees, MEA/MFT.

III. FINDINGS OF FACT

1. The Federation of Montana State Prison Employees, MEA/MFT, is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6), and is

the certified exclusive bargaining representative for certain employees of Montana State Prison.

2. The Montana Department of Corrections - Montana State Prison and Montana Correctional Enterprises (DOC) is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. Montana State Prison (MSP) is a multi-classification correctional facility for adult male offenders. The institution is operated for the incarceration, treatment, and rehabilitation of the inmate population for the State of Montana.

4. The Martz Diagnostic and Intake Center at MSP opened in August 2004. It houses the majority of services provided by the Reception and Records Unit. The mission of the Records and Reception Unit is to ensure the safety of the public and the institution by holding offenders accountable for their actions while providing the opportunity for change.

5. Denise McNeeley is the manager of the Reception and Records Unit. She has five individuals who report to her directly: Janet Cox, records manager, Sam Casey, case manager, Jerry Beasley, admissions manager (position 22591), and two correctional sergeants.

6. The admissions office employs positions 22003, 22590, and 22040, pay band 3 correctional technicians, reporting to the admissions manager.

7. The records office is responsible for insuring accuracy and completeness of all inmate files. Janet Cox, the manager of the records office, has one employee who reports to her directly, the records supervisor.

8. Position 22072 in pay band 4 is the records supervisor at Montana State Prison. Sylvia Dubuisson currently holds this position.

9. The records office employs positions 22077, 22073, 22074, 22075, 22044, 222017, 22630, and 22132, pay band 3 records technicians, reporting to the records supervisor.

10. DOC and the federation are parties to a collective bargaining agreement that defines the bargaining unit as follows:

[A]ll employees of Montana State Prison classified as correctional officers, correctional technicians, recreation specialists, maintenance workers, mental health technicians, psychology specialists, food service workers, registered nurses, licensed practical nurses, infirmary aides, and all other employees who are not supervisory, confidential or managerial

11. The records supervisor and admissions manager are presently members of the bargaining unit represented for collective bargaining purposes by the federation.

12. Dubuisson was a lead worker in the records unit beginning in 1995. In 2002, DOC revised her job profile and titled her position records supervisor. DOC took this action because the workload of Cox was excessive, and DOC concluded that having an intermediate supervisor for the records technicians would alleviate her workload.

13. The job profile (formerly called a position description) for the records supervisor position identifies two major duties and responsibilities for the records supervisor position. The first major duty states:

The Correctional Record Supervisor performs supervisory duties relative to the operation of the Records functions of the Reception/Records Unit.

- a. At the direction of the Records Manager, assigns duties to Records technicians, reviews completed work.
- b. Assures the accuracy and completeness of files.
- c. Reviews documents, defining and recording of sentences and terms as shown in commitment orders; makes determinations based on court orders, legal/administrative provisions relating to the receipt, custody and release of inmates.
- d. Consults with the Legal Unit concerning status of cases, serves as an expert witness in legal proceedings, prepares legal documents, works closely with Legal Unit in regard to past practice

based on incumbents [sic] experience and knowledge in the Records Department and training Records staff.

e. Answers inquiries from various sources, including the Courts, County Attorneys, Public Defenders and Probation and Parole Officers regarding inmate records, parole eligibility and discharge dates, answers correspondence directly and drafts responses for administrative personnel and the Governors [sic] Office.

f. Assures confidentiality of inmate records, assures accuracy of entries into ACIS, acts as a resource for admissions, classification and treatment and legal processes.

g. Processes the final stages of the Interstate Agreement on Detainers insuring that all paperwork is in order prior to releasing an inmate to the custody of another state.

The job profile states that the records supervisor performs this duty 80% of the time.

14. The second major duty listed on the job profile for the records supervisor position states:

The Correctional Records Supervisor supervises Records Technicians.

a. Supervises all aspects of Records functions, assigns duties within Records.

b. Participates in hiring and training of staff, evaluates all work of subordinates.

The job profile states that the records supervisor performs this duty 20% of the time.

15. Section II, part 5, of the job profile states that the records supervisor supervises 6 other positions, and has responsibility for hiring, firing, performance management, supervision, and discipline.¹

16. Section III of the job profile lists the minimum qualifications for the records supervisor position but lists no reference to knowledge or skill in the area of supervision. This section of the job profile identifies certain behaviors required to perform the job, including communication, leadership, and initiative and accountability.

17. Dubuisson participates in hiring new records technicians. She has participated in hiring since 1989, before she became a lead worker or supervisor, and has participated in the selection of four technicians. Her role in hiring is to approve the job posting, determine the questions to be asked in the interview, screen applications and participate with two other persons in an interview panel. The screening involves objectively rating applications against set criteria, to determine which applicants to select for interviews. The interview process is a structured process in which each panel member scores the interview, and the panel recommends the person with the highest score for hire. Dubuisson does not exercise independent judgment in hiring.

18. Dubuisson is involved in the discipline of records technicians, which could ultimately result in discharge. Her involvement consists of identifying performance deficiencies or behavior meriting discipline, then working with Cox to impose discipline. She has worked with Cox to prepare a corrective action plan for one records technician. She does not exercise independent judgment to discipline employees.

19. Dubuisson assigns work to the records technicians. The work assigned consists of creating new files, maintaining files, updating files, sending out required notifications, reviewing the work of other technicians, opening and distributing mail, completing certain activities, such as checking electronic mail and voice mail, and working on spreadsheets, following certain procedures, and completing certain forms. Dubuisson performs many of the same duties as the records technicians. Her role in assignment of work is that of a lead worker distributing work among a group of co-workers and does not require independent judgment.

¹As of the date of hearing, the number of records technicians subordinate to Dubuisson had increased to 8.

20. Dubuisson has no involvement in employee transfers, suspensions, lay offs, recalls, or promotions. She can recommend an employee for recognition in DOC's positive action report program, but otherwise has no involvement in rewards of employees.

IV. DISCUSSION²

DOC seeks a determination that Dubuisson and Beasley should be excluded from the collective bargaining unit for Montana State Prison 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. 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)(a), as amended by the 2005 legislature effective April 28, 2005, defines supervisory employee as "an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment." The parties concur that the amended definition of "supervisory employee" is applicable to this proceeding.

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. The Montana Supreme Court and the Board of Personnel Appeals follow

²Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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. Supervisors are also excluded from bargaining units under federal law, and the definition of supervisor in the federal law is very similar to the definition in the state law. However, House Bill 418 prohibits the Board from using “any secondary test developed or applied by the National Labor Relations Board” to determine whether an employee is a supervisor. Mont. Code Ann. § 39-31-103(11)(b). Therefore, to the extent that NLRB precedent relies on any “secondary test” or other test not consistent with Mont. Code Ann. § 39-31-103(11)(a), as amended by House Bill 418, reliance on such precedent is improper.

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 exercises the power 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.

The federation stipulated at the commencement of hearing that Beasley is a supervisory employee. Therefore, his position is not properly included in the bargaining unit. The balance of the discussion of the statutory factors in this decision relates to the position held by Dubuisson.

Dubuisson’s authority, duties, and responsibilities are listed in her job profile. The duties and responsibilities section of the job profile states she “performs supervisory duties relative to the operation of the Records functions” 80% of the time and “supervises Records Technicians” 20% of the time. Comparing the two statements, it is unclear how these two major duties and responsibilities differ.

Most of the specific duties listed under the major duty of “performs supervisory duties” such as reviews documents, consults with the legal unit, answers inquiries, and so on, are not themselves supervisory duties, but rather are statements of the routine work of the records section. Although section II(5) of her job profile indicates that she has responsibility for hiring, firing, and discipline, there is no discussion of these responsibilities in the substantive description of her duties. At best, the job profile states that she has responsibility for assignment, and in the first place it is mentioned, that responsibility is performed “at the direction of the records manager.”

Taking the job profile together with the testimony presented at hearing, it is clear that most of the work Dubuisson performs is the same as the work performed by her subordinates, and that she functions in a lead worker capacity. Her duties and responsibilities are further discussed in relation to the statutory factors regarding supervisory status as follows.

Hiring

The testimony established that, although Dubuisson participates in hiring records technicians, she does not exercise independent judgment in hiring. McNeeley, manager of the Reception and Records Unit at MSP, the area in which Dubuisson is employed, conceded in testimony that Dubuisson did not exercise independent judgment. Therefore, the criterion of hiring does not establish her to be a supervisory employee.

Discharge and discipline

The testimony established that Dubuisson has had no involvement in discharge, but assisted her supervisor with discipline such as corrective action. She considered it improper to discipline subordinates because of her membership in the union. In the single example of corrective action directed toward a records technician admitted into evidence, the performance plan was written by Cox, not Dubuisson. Even though it was signed by both, Cox prepared it because it referred to Dubuisson in the third person.

The issue of discipline poses a dilemma for DOC because it wishes to have Dubuisson impose discipline, and the fact that she is presently in the bargaining unit appears to be a barrier to performing this duty. However, she is not presently exercising authority to discipline employees using independent judgment, and the

Board in most cases will not consider prospective duties or circumstances in determining bargaining units. *Harlem Public Schools*, UC 5-2001 (September 19, 2001).

Assignment

Dubuisson assigns work to the records technicians; however, as noted in paragraph 19 of the findings, *supra*, this work is performed as a lead worker and does not require independent judgment. Further, Dubuisson's job profile provides that she assigns work at the direction of the records manager, bolstering the conclusion that this function does not entail independent judgment.

Other considerations

Much of Dubuisson's responsibility as a lead worker entails problem solving, direction, and performance management for the records technicians. These responsibilities implicate what would have been considered in previous Board orders as direction. Review of completed work and performance appraisals can be means of directing the work of employees. However, the amendments to Mont. Code Ann. § 39-31-103(11) contained in House Bill 418 deleted the factor "having the responsibility to direct" other employees from the definition of supervisory employee. Therefore, Dubuisson's responsibility to direct the records technicians cannot form the basis for excluding her from the 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 admissions manager (position 22591) in the Reception and Records Unit of Montana State Prison is a supervisory employee pursuant to Mont. Code Ann. § 39-31-103(11). As such, it is not properly included in the unit established by the Board for collective bargaining purposes.

3. The records supervisor (position 22072) in the Reception and Records Unit of Montana State Prison is not a supervisory employee pursuant to Mont. Code Ann. § 39-31-103(11). As such, it remains properly included in the unit established by the Board for collective bargaining purposes.

VI. RECOMMENDED ORDER

The admissions manager (position 22591) is a supervisor and not properly included in the unit established by the Board for collective bargaining purposes. The records supervisor (position 22072) is not a supervisor and remains properly included in the unit established by the Board for collective bargaining purposes.

DATED this 20th day of June, 2005.

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 July 13, 2005. 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 true and correct copies of the foregoing document were, 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:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624-1152

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

Ruth Anne Hansen
Labor Relations Bureau
Department of Administration
P.O. Box 200127
Helena, MT 59620-0127

DATED this 20th day of June, 2005.

Sandy Duncan