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MAY 28 1980

BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF
2 THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CUSTER

3 * * * * *

4 CITY OF MILES CITY, MONTANA)
5 a municipal corporation,)

6 Petitioner,)

No. 16,878

7 v.)

JUDGMENT

8 AMERICAN FEDERATION OF)
9 STATE, COUNTY, AND MUNICIPAL)
10 EMPLOYEES, AFL-CIO, and)
11 THE BOARD OF PERSONNEL APPEALS)
12 an agency of the State of)
13 Montana,)

14 Respondent.)

15 * * * * *

16 The Court having entered its Order on May 14, 1980, hereby
17 enters its Judgment in accordance with said Order as follows:

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

19 1. That the Respondents have judgment against the Petitioner
20 and that Petitioner's Petition for Judicial Review be dismissed in
21 its entirety.

22 DATED this 27 day of May, 1980.

23 A. E. MARTIN

24 DISTRICT JUDGE

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BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE SIXTEENTH
2 JUDICIAL DISTRICT OF THE STATE OF MONTANA,
3 IN AND FOR THE COUNTY OF CUSTER

4 -00-

07-79

5 CITY OF MILES CITY, MONTANA) No. 16,878
6 a municipal corporation,)

7 Petitioner,)
8) COURT MEMORANDUM

9 -VS-)
10) AND ORDER

11 AMERICAN FEDERATION OF)
12 STATE, COUNTY, AND MUNICIPAL)
13 EMPLOYEES, AFL-CIO, and)
14 THE BOARD OF PERSONNEL)
15 APPEALS, an agency of the)
16 State of Montana,)

17 Respondent.)

18 -----
19 On February 3, 1979, the American Federation of State,
20 County, and Municipal Employees, AFL-CIO (hereinafter AFSCME)
21 filed with the Board of Personnel Appeals (Hereinafter Board)
22 a petition for new unit determination and election. In the
23 petition it sought a unit of "All Officers of the Police Depart-
24 ment" excluding the "Chief and Assistant Chief" for the City of
25 Miles City (hereinafter City). On February 15, 1979, this board
26 received a counter-petition from the City taking exception to
27 AFSCME's proposed unit, stating that lieutenants ought to be ex-
28 cluded from the bargaining unit. On March 16, 1979, a hearing
29 in the matter was conducted. As a result of that hearing on
30 June 18, 1979, the hearing examiner issued his Findings of Fact,
31 Conclusions of Law and Recommended Order finding that the approp-
32 riate unit should include the lieutenants in question. Exceptions
to the Recommended Order were filed by the City. After a hearing

1 on those exceptions, the Board issued an Order upholding the hear-
2 ing examiner and ordered an election be conducted. On November
3 12, 1979, as a result of the election conducted by this board,
4 AFSCME was certified by this Board as the Bargaining Representa-
5 tive for the Police officers of the Miles City Police Department,
6 excluding the Chief and the Assistant Chief.
7

8 The City then filed a petition for Judicial Review which
9 leads us now to these proceedings.

10 The petitioner (City) in its brief states the issues as
11 follows:

12 A. "Whether or not the Board was arbitrary and erroneous
13 in its finding that the lieutenants of the Miles City Police De-
14 partment were not supervisory personnel."

15 B. "Whether or not the Board had jurisdiction to hear the
16 matter when it failed to give notice of the pending action to
17 the Miles City Police Protective Association pursuant to
18 MCA 39-31-207(1)(a)(ii)."

19 With reference to the first issue the Board of Appeals made
20 findings of fact and conclusions of law which in substance declare
21 that four lieutenants (shift commanders) of the police department
22 were not supervisory employees as that term is defined in MCA
23 39-31-103(3) and therefore should be included in the bargaining
24 unit selected by the employees.

25 It is not the function of this Court to agree or disagree
26 with the findings of the Board when there is substantial evidence
27 supporting those findings. After reviewing the record and the
28 applicable law, the Court finds that the evidence adequately
29 supports the Board's findings and conclusion that the lieutenants
30
31
32

1 or shift commanders are not "supervisory employees."

2 With reference to the second issue, the Court again agrees
3 with the contentions and arguments of the Board. The City has
4 not been prejudiced by the circumstance that the former bargain-
5 ing unit (MCPA) was not given notice. The MCPA was aware of the
6 pending proceedings for designation of a new bargaining unit,
7 could have intervened and all employees belonging to that bargain-
8 ing unit had a ballot choice between the two bargaining units.
9 While not dwelled upon in the arguments, if the shift commanders
10 were not excluded as supervisory employees under MCPA, why does
11 the City now seek to exclude them from the AFSCME?

12 Now Therefore, It Is Ordered that the findings of the Board
13 declaring that the Shift Commanders are not supervisory employees
14 within the statutory definition found in MCA 39-31-103(3) be
15 affirmed.

16 Dated this 14th day of May, 1980.

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21 
22 DISTRICT JUDGE

23 Copy to: Counsel of Record
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION #7-79:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
APL-CIO,

Petitioner,

- vs -

CITY OF MILES CITY, MONTANA,
W. DEAN HOLMES, MAYOR,

Employer.

ORDER

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Stan Gerke on June 18, 1979.

Employer's Exceptions to Findings of Fact and Conclusions of Law were filed by Kenneth R. Wilson, City Attorney of Miles City, on July 6, 1979.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Employer to the Findings of Fact, Conclusions of Law and Recommended Order filed by Mr. Kenneth R. Wilson, are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Stan Gerke, as the Order of this Board.

DATED this 10th day of September, 1979.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above ORDER to the

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following persons on the 13th day of ~~August~~^{September}, 1979:

Kenneth R. Wilson, City Attorney
Miles City
City Hall
Miles City, MT 59301

George Hagerman, Field Representative
AFSCME, AFL-CIO
600 North Cooke
Helena, MT 59601

W. Dean Holmes, Mayor
City of Miles City
City Hall
Miles City, MT 59301



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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UD #7-79:)
)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES,)
AFL-CIO,)
)
Petitioner,)
)
vs.)
)
CITY OF MILES CITY, MONTANA,)
W. DEAN HOLMES, MAYOR,)
)
Employer.)

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND RECOMMENDED
ORDER

* * * * *

Petitioner in above captioned matter filed Petition for New Unit Determination and Election with this Board on February 3, 1979, for certain employees of the City of Miles City, Montana. The Petitioner proposes the appropriate bargaining unit to consist of all officers of the police department excluding the Chief and Assistant Chief.

On February 15, 1979, this Board received a counter-petition from the Employer. The Employer proposed that the appropriate unit should consist of all appointed police officers of sergeant's rank or lower.

A formal hearing in this matter was conducted on March 16, 1978, in the Conference Room, City Hall, Miles City, Montana, before Stan Gerke, Hearing Examiner. The hearing was held under authority of Section 39-31-207 MCA and in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4 MCA). The purpose of the hearing was to determine an appropriate collective bargaining unit. Petitioner was represented by Nadiean Jensen, Field Representative, Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, Helena, Montana. Employer was represented by Kenneth R. Wilson, City Attorney, Miles City, Montana.

STIPULATIONS

The parties stipulated that the police force consisted of

1 the Chief of Police, the Assistant Chief of Police, one Detective
2 Lieutenant (also functions as Shift Commander), four Lieutenants
3 (Shift Commanders), and nine Patrolmen for a total of 16 employees

4 ISSUES

5 The Employer contended that the five Lieutenants, also known
6 as Shift Commanders, are supervisory employees pursuant to Section
7 39-31-103(3) MCA and should be excluded from the appropriate
8 bargaining unit.

9 Also, the Employer contended that the purpose of the author-
10 ization cards used by the Petitioner was misrepresented and the
11 cards were gained by fraud. Therefore, the Employer deduced
12 that the 30 percent showing of interest requirement had not been
13 met in accordance with Board's rule ARM 24.26.512(5).

14 FINDINGS OF FACT

15 1. Testimony revealed that the four Lieutenants, also
16 known as Shift Commanders (Lt. James C. Smith, Lt. Edward Curnan,
17 Lt. Wade Schmidt, and Lt. Bobbie Joe Stabio) are each in charge
18 of separate eight-hour shifts consisting of two Patrolmen.
19 According to Lt. Smith, the Shift Commanders are "not so much
20 anymore" in charge of the Dispatcher assigned to the shift.

21 2. Lt. Detective John Uden testified his primary assignment
22 was that of investigating crimes; however, he sometimes performed
23 as Shift Commander and assumed the duties of that position.

24 3. The Shift Commanders spend 90 percent of their time
25 during each eight-hour shift in a car patrolling or walking a beat.
26 Lt. Smith testified that at no time he would spend more than ten
27 percent of his time in the office. Lt. Curnan testified he spent
28 the majority of his time "up the street" working with the Patrol-
29 men.

30 4. It is undisputed that the Shift Commanders cannot hire,
31 terminate, promote, reward, or transfer employees, nor can they
32 adjust grievances of other employees.

1 5. Chief of Police James M. Certain testified that Shift
2 Commanders are, "in charge of any disciplinary action during this
3 eight-hour period." However, Lt. Smith testified that if he
4 should discipline any officer, that action taken is not final,
5 but is reviewed by the Chief for final action. Lt. Curnan
6 testified that he could send an officer home if that officer did
7 something wrong, but could not fire him or suspend him. Lt.
8 Curnan did testify that he could recommend disciplinary action
9 but admitted he had never done so. Lt. Curnan added that he
10 really didn't know if his recommendation would be effective. It
11 appears the Shift Commanders' authority to discipline is quite
12 limited and surely is subject to review. In addition, discipl-
13 inary recommendations made by Shift Commanders appear not to be
14 effective if recommendations are made at all.

15 6. Chief Certain testified that Shift Commanders are "the
16 only man [men] who is [are] authorized to pay overtime in our
17 structure." Chief Certain added that Shift Commanders sign their
18 own timesheets. Lt. Curnan explained that he did approve overtime
19 worked by patrolmen on his shift; however, because he usually
20 wasn't present to authorize the overtime to be worked, he would
21 approve timesheets after such time was worked. Under direct
22 examination, Lt. Curnan first testified he approved his own
23 overtime but modified his testimony and explained, " I turn it
24 into the Chief and he, actually, I guess, he ... he gets it . . .
25 he ok's it, if its valid." I find that the approval of timesheets
26 by Shift Commanders is routine and/or clerical in nature.
27 Apparently, the Chief of Police gives final approval.

28 7. Chief Certain, George W. Hurs, Councilman and Chairman
29 of the Police and Fire Committee, and Counsel for the Employer
30 emphasized "management meetings" that are held usually monthly
31 and are attended by only Lieutenants and above. Lt. Smith
32 testified, "well, normally . . . normally the Chief and Assistant
Chief, well, they're . . . they're more or less the main speakers

1 and we're [Lieutenants] . . . we're there to listen and try to
2 follow through on what they'd like to have done." Lt. Smith and
3 Lt. Curnan both testified they have input into the management
4 meetings; however, neither could recall any policy(s) being
5 formulated as a result of their input or suggestions. I cannot
6 find that attendance by Shift Commanders to the "management
7 meetings" suggests that they are supervisory.

8 8. I find that the Shift Commanders direct and assign work
9 to the patrolmen on their shift in accordance with standard
10 operating procedures. This is primarily supported by the testimony
11 of Lt. Smith.

12 9. Lt. Smith testified he could see no reason why other
13 police officers (Patrolmen) could not perform many of the duties
14 listed as supervisory functions on Employer Exhibit No. 2 (State-
15 ment of Duties prepared by Lt. Smith). Lt. Smith added, "It has
16 been done before." Lt. Smith explained that the duties he now
17 has as lieutenant are not different from his duties when being a
18 sergeant. He added that, if sergeants were on board now, they
19 could perform the same duties as lieutenants. Further testimony
20 revealed that Master Patrolmen occasionally perform as Shift
21 Commanders.

22 10. Assistant Chief of Police Charles Beauchot testified
23 that a fellow police officer gave him an authorization card of
24 the Petitioner; Beauchot did not talk to a representative of the
25 Petitioner. Beauchot explained that he was not asked to sign a
26 card and added, "He [fellow police officer] asked if I was
27 interested in hearing what the union representative could offer
28 our department, and he said if I was to just go ahead and sign
29 the card . . . he did state there is no obligation." Beauchot
30 testified that he did not sign the card.

31 11. Employer's Exhibits #1 and #9, both written agreements
32 between the Miles City Police Protective Association, representing
the police officers, and the City of Miles City, the Employer,

1 were identified without hesitance by all witnesses. Employer's
2 Exhibit #1 was explained to be the initial agreement implementing
3 the "lieutenant structure" within the police department.
4 Employer's Exhibit #9 was described as the agreement to continue
5 the "lieutenant structure" and an agreement on a salary schedule.
6 The exhibits were noted as containing "wages and working condi-
7 tions" and testimony clearly indicated the agreements were
8 reached through negotiations between the police officers and the
9 Employer. Employer's Exhibit #9, the current written agreement
10 between the parties, expires June 30, 1979. I find that both
11 exhibits are working agreements reached through collective
12 bargaining, and Employer's Exhibit #9 is in force and effective
13 through June 30, 1979.

14 DISCUSSION

15 The Employer contended that the five Lieutenants should be
16 excluded from the appropriate bargaining unit because of super-
17 visory status. Section 39-31-103 MCA defines "supervisory
18 employee" as "any individual having authority in the interest of
19 the employer to hire, transfer, suspend, lay off, recall, promote,
20 discharge, assign, reward, discipline other employees, having
21 responsibility to direct them, to adjust their grievances, or
22 effectively to recommend such action if in connection with the
23 foregoing the exercise of such authority is not of a merely
24 routine or clerical nature but requires the use of independent
25 judgment." In reference to Findings of Fact #4, the Shift
26 Commanders cannot hire, transfer, promote, discharge, reward or
27 adjust grievances of other employees. Aside from one example of
28 sending a patrolman home early during a shift because he "did
29 something wrong," the Shift Commanders have little authority to
30 discipline (see Findings of Fact #5). It was also found that
31 Shift Commanders had no impact in recommending disciplinary
32 action and surely did not possess the authority to suspend for
disciplinary reasons. Shift Commanders assign work and direct

1 the patrolmen in accordance with standard operating procedures
2 (see Findings of Fact #8). Exercising independent judgment is a
3 key factor in determining if an employee is supervisory. The
4 use of routine, standard operating procedures is surely not an
5 example of the use of independent judgment. The Shift Commanders
6 were found to be approving overtime worked in a clerical fashion
7 (see Findings of Fact #6) and attended "management meetings"
8 more in the role of a spectator than a participant (see Findings
9 of Fact #7). Testimony further revealed that the duties of
10 Lieutenants were no different than that of sergeant. There is
11 little doubt that the duties performed by the Shift Commanders
12 fall short of the definition of a "supervisory employee."

13 The second issue presented by the Employer was the conten-
14 tion that authorization cards were gained through misrepresenta-
15 tion. Only one witness, Assistant Chief of Police, Charles
16 Beauchot, gave testimony relating to this matter (see Findings
17 of Fact #10). Mr. Beauchot testified that a fellow police
18 officer offered him an authorization card; Mr. Beauchot did not
19 talk with a person representing the Petitioner. In addition,
20 Mr. Beauchot testified that he did not sign a card. The testimony
21 given is void of any foundation for the Employer's contention of
22 misrepresentation and, therefore, finding no merit in the charge,
23 I dismiss the Employer's contention.

24 In reference to Findings of Fact #11, a working agreement
25 presently exists between the Employer and the police officers
26 who are represented by the Miles City Police Protective
27 Association. According to the Rules of this Board, the proper
28 petition that should have been filed to represent the police
29 officers was a Petition for Decertification instead of a Petition
30 for new Unit Determination and Election. However, the Petitioner,
31 as pointed out during the hearing, had no knowledge of the
32 existing working agreement because it was not filed with this
Board in accordance with ARM 24.26.501. Since the petition

1 filed should have been denominated as a Decertification Petition,
2 the petition is hereby amended to read Petition for Decertifica-
3 tion. Because the petition is considered a Decertification
4 Petition, the incumbent representative, Miles City Police
5 Association, shall appear on the ballot. The difference in
6 procedures between a Petition for Decertification and a Petition
7 for Unit Determination and Election is not significant and no
8 harm can be shown to the Employer. The existance of a harmless
9 error is no basis for the dismissal of the petition.

10 Employer made the following motion during the pre-hearing
11 conference:

12 Comes now the City of Miles City and hereby moves to
13 dismiss the petition of AFSCME on the grounds that it
14 fails to set a claim upon which relief may be granted
15 and upon the further grounds that the examiner has
16 ruled that the petition is invalid [valid]¹ without
17 proof and has improperly placed the burden of proof on
18 the answering party (City of Miles City) and counter
19 petitioner to which such ruling counter petitioner
20 objects. Then as a further grounds for such objection,
21 the City alleges that its incumbent upon the petition
22 AFSCME to establish preponderance of the evidence that
23 the bargaining unit that they propose contains no
24 administrative or supervisory personnel.

25 which was modified by the Employer at the closing of the hearing
26 to include: Board's Rule ARM 24.26.512(4)(a through f) sets
27 forth what a Petition for New Unit Determination and Election
28 shall contain. Part (4)(d) discusses existing contracts covering
29 any employees in the proposed unit. Petitioner's petition does
30 not address the existing contract, thus, the petition is incorrect

31 I hereby deny the Employer's Motion for the following
32 reasons. First, the documentation of the 30 percent valid
authorization card requirement is an administrative function and
cannot be challenged. Secondly, it was found that a bargaining

30 ¹Although the word "invalid" appears in the written Motion made by the
31 Employer, the intent of the Motion, further explained by the counsel for the
32 Employer, was that the Employer was objecting to the acceptance of Petitioner's
petition by this Board without further proof to the Employer that the 30 percent
signed authorization card requirement had been made. Thus, the word "valid" is
proper to lend the proper intent to the Motion.

1 unit existed which included the Lieutenants. The Employer
2 sought to change the status quo by requesting that the Lieutenants
3 be excluded. By this action, the Employer is assuming the
4 burden-of-proof. Thirdly, the petition filed by the Petitioner
5 was modified to be a Petition for Decertification, thus being
6 correct.

7
8 CONCLUSIONS OF LAW

9 A unit consisting of all police officers employed by the
10 City of Miles City, Montana, with the exception of the Chief of
11 Police and the Assistant Chief of Police is an appropriate unit
12 for purposes of collective bargaining under Section 39-31-103(2)
13 MCA and Section 39-31-202 MCA.

14
15 RECOMMENDED ORDER

16 It is ordered that an election by secret ballot shall be
17 conducted as early as possible, in accordance with the rules and
18 regulations of the Board of Personnel Appeals, among the employees
19 in the above described bargaining unit, employed by the City of
20 Miles City, Montana, on February 3, 1979, to determine whether
21 or not they desire to be represented for purposes of collective
22 bargaining. The ballot shall include the existing bargaining
23 representative, the Miles City Police Protective Association,
24 the American Federation of State, County and Municipal Employees,
25 AFL-CIO, and No Representative.

26
27 SPECIAL NOTE

28 In accordance with the Board's Rule ARM 24.26.107(2), the
29 above RECOMMENDED ORDER shall become the FINAL ORDER of this
30 Board unless written exceptions are filed within 20 days after
31 service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
32 RECOMMENDED ORDER upon the parties.

DATED this 18th day of June, 1979.

BOARD OF PERSONNEL APPEALS

By



Stan Gerke
Hearing Examiner

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that on
the 18 day of June, 1979, a true and correct copy of the
above captioned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER was sent to the following:

W. Dean Holmes, Mayor
City of Miles City
City Hall
Miles City, MT 59301

Kenneth R. Wilson, City Attorney
City of Miles City
City Hall
Miles City, MT 59301

George F. Hagerman, Field Representative
AFSCME, AFL-CIO
600 North Cooke Street
Helena, MT 59601

Jennifer Jacobson

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