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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION)	
No. 14-80:)	
BUTTE TEAMSTERS UNION LOCAL No. 2,)	
)	
Petitioner,)	
)	FINDINGS OF FACT;
-vs-)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED
COUNTY OF MISSOULA,)	ORDER
)	
Respondent.)	

* * * * *

On May 27, 1980, the Board of Personnel Appeals received a petition for New Unit Determination and Election from the Butte Teamsters Union Local No. 2 (Petitioner), proposing a unit comprised of all employees doing work as Public Safety Officers at the Missoula County Airport, excluding the Chief of Public Safety.

On June 10, 1980, the County of Missoula (County) filed a counter-petition, proposing that all Senior Public Safety Officers be excluded from the proposed unit on the grounds that the Senior Officers are supervisory employees as defined in section 39-31-103(3), MCA, and/or management officials as defined in section 39-31-103(4), MCA.

A hearing was held on June 10, 1980, in order to determine the appropriate unit; under the authority of sections 39-31-202, and 39-31-207, MCA, and in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA). Petitioner was represented by Patrick McKittrick, an attorney from Great Falls, Montana, and the County was represented by Michael Sehestedt, a Deputy County Attorney for Missoula County.

Having carefully reviewed the evidence presented, I find the following facts:

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FINDINGS OF FACT

1. At the Missoula County Airport, the organizational structure for the Public Safety Division extends from the Airport Director, through the Chief of Public Safety, the Senior Public Safety Officers, and down to the basic Public Safety Officers.

2. At the time of the July 10th hearing, there were 16 authorized Public Safety Officer Positions: a Chief of Public Safety, 3 Senior Public Safety Officers (senior officers), and 12 Public Safety Officers (basic officers).

3. In a 24-hour period, there are 3 eight-hour shifts. As many as four basic officers may be on duty with one senior officer. However, during the "A" shift or 1st shift from 12:00 a.m. to 8:00 a.m., generally no senior officer is present because only one or two basic officers are on duty.

4. The record is replete with uncontradicted testimony that the final authority to hire, transfer, suspend, lay off, recall, reward, and discharge all Public Safety Officers, including the Chief, senior officers, and basic officers, rests in the Airport Director. (Testimony of Green, Engelhard, and Moffett)

5. There are a set of standing orders which the Chief uses in his day-to-day administration of the Public Safety Division, and which guide the officers generally in their routine duties. (Testimony of Green and Moffett)

6. Generally, a senior officer performs the same duties on a shift as the basic officer, i.e. manning the security or screening point, or manning the crash-fire station. (Testimony of Moffett and Ochsner)

7. A senior officer has the additional duty to assign work on his shift to the basic officers. In assigning the work on his shift, the senior officer decides who is to man the screening point and who is to man the crash-fire and rescue stations.

8. In emergency situations, it is the duty of the senior

1 officer on shift to take the initiative. However, the senior
2 officer takes charge of an emergency situation only "until a
3 superior arrives." (See Respondent's Exhibits #2 and #4.)

4 9. Airport Director Green testified that the major dif-
5 ference between the duties of a senior officer and those of a
6 basic officer is that "the Senior Public Safety Officer is actually
7 the supervisor of basic officers in the absence of the Chief of
8 Public Safety."

9 10. There is an inconsistency in the record as to how often
10 a senior officer actually acts for the Chief. Mr. Green answered
11 affirmatively to the question "Is it built into the schedule that
12 there will be periods during each day when the Senior Public
13 Safety Officer is in charge?" However, basic officer Ochsner said
14 he could remember only one time since his employment last November
15 when a senior officer was appointed 'Acting Chief'.

16 11. A senior officer has limited authority to discipline.
17 Although senior officer Moffett testified that he could remember
18 no occasion in which he disciplined a basic officer, he did
19 believe that he had the authority to "send someone home" for
20 sleeping on the job. Airport Director Green also could not remember
21 an occasion when a senior officer disciplined a basic officer.

22 12. A senior officer has no authority to approve vacation
23 time, or days off. No shift changes may be made without authori-
24 zation of the Chief.

25 13. At times, basic officers have been appointed senior
26 officers for a few days. When this happens, the acting senior
27 officer continues to perform basically the same duties he performs
28 as a basic officer. (Testimony of Ochsner)

29 14. Senior Officer Moffett testified that when a basic
30 officer comes to him with a grievance he "tends to tell the Chief."
31 Mr. Moffett did admit however, that he had been able to resolve a
32

1 few minor grievances.

2 15. A senior officer may make recommendations on needed
3 changes in procedures and standing instructions, and in handling
4 real or potential personnel problems. (Respondent's Exhibit #4,
5 testimony of Green)

6 16. There are no examples on the record of a senior officer
7 recommending the hiring or discharging of a basic officer, although
8 Mr. Green did testify that he encourages senior officers to make
9 recommendations on "overall operation, detailed procedure, and
10 personnel performance." When asked what would happen if a senior
11 officer were to make such a recommendation, Mr. Green responded
12 that either he or the Chief would analyze the recommendation from
13 his perspective and determine if the recommendation was adaptable
14 to the unit.

15 17. The only evidence on the record perhaps pertinent to the
16 question of management official is Mr. Green's testimony concerning
17 a senior officer's authority in the absence of the Chief. Mr.
18 Green testified that in the absence of the Chief, a senior officer
19 may "take charge of the situation whatever it is" and "act as the
20 Airport's representative." Also, Mr. Green testified that in the
21 absence of the Chief, a senior officer has the authority to request
22 assistance from other agencies on behalf of the Airport, and that
23 the Airport would be bound by such a request.

24 ISSUES

25 1. Whether the Senior Public Safety Officers at the Missoula
26 County Airport are supervisory employees as defined in section
27 39-31-103(3), MCA, and thereby statutorily excluded from the
28 proposed unit.

29 2. Whether the Senior Public Safety Officers at the Missoula
30 County Airport are management officials as defined in section
31 39-31-103(4), MCA, and thereby statutorily excluded from the
32 proposed unit.

1 DISCUSSION

2 I. Supervisory Issue

3 Section 39-31-103(3), MCA, defines supervisory employee
4 as:

5 any individual having authority in the interest of the
6 employer to hire, transfer, suspend, lay off, recall,
7 promote, discharge, assign, reward, discipline other
8 employees, having responsibility to direct them, to
9 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.

10 Mr. Green, the Airport Director, presented the uncontra-
11 dicted, and repeatedly affirmed, testimony that a senior officer
12 at the Missoula County Airport has no authority to hire, transfer,
13 lay off, recall, promote, discharge, or reward. To support its
14 contention that senior officers are supervisory employees, the
15 County brought out testimony that a senior officer has the authority
16 to discipline a basic officer for flagrant violations while on
17 duty, to assign the basic officers to their stations, to act for
18 the Chief in his absence, and to make recommendations involving
19 procedural and personnel problems.

20 Petitioner succeeded in showing, however, that in the day-to-day
21 workings of the Airport, the duties of the senior officer differ
22 only slightly from those of the basic officer. After assigning
23 the basic officers their positions for the day, the senior officer
24 takes his place alongside the basic officers. In these everyday,
25 routine duties, the senior officer has only the added responsibility
26 of making particular work assignments. Further, neither those
27 witnesses for the County nor Petitioner could recall any time when
28 a senior officer actually disciplined a basic officer, or made an
29 effective recommendation.

30 Although some of the duties performed by the senior officers
31 indicate supervisory authority, this Board has consistently held
32 that minor supervisory employees are not "supervisory employees"

1 within the meaning of section 39-31-103(3), MCA, but are more
2 properly called leadworkers.

3 For example, in American Federation of State, County,
4 and Municipal Employees, AFL-CIO vs. City of Miles City, UD 7-79
5 (hereafter referred to as the Miles City case), the four Lieutenants
6 of the Miles City Police Department were found not to be "supervisory
7 employees" in spite of the fact that a Lieutenant could send an
8 officer home during a shift because he "did something wrong". The
9 Lieutenants could not be considered supervisory employees for the
10 following reasons: their disciplinary authority was severely
11 limited by the fact that suspensions would have to be approved by
12 higher authorities; they exercised little independent judgment
13 since standard operating instructions guided their routine duties;
14 and they did the same work as basic officers 90% of the time.

15 A similar conclusion was reached in Billings Firefighters
16 Local 521 v. City of Billings, UC 1-1977 (hereafter referred to as
17 the Firefighters' case) in which the Captains of the Fire Department
18 were found not to be supervisory employees. In the Firefighters'
19 case, a series of considerations were set down which may be used
20 to distinguish supervisors from leadworkers:¹

21 1. whether the employee has independent authority to hire,
22 fire, adjust grievances, discipline, or give raises and other
23 benefits;

24 2. whether the employee's exercise of authority, particularly
25 in the areas of assignment and direction of work, is routine in
26 nature, i.e. follows established procedures;

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28
29 ¹For typical NLRB decisions see: Central Buying Service, 223 NLRB
30 77, 92 LRRM 1145 (1976); Pinecrest Convalescent Home, 222 NLRB 10, 91
31 LRRM 1082; Mountain Manor Nursing Home, 204 NLRB 425, 83 LRRM 1337
32 (1973); Leisure Hills Health Center, 203 NLRB 46, 83 LRRM 1037;
NLRB v. Monroe Tube, Inc., 545 F 2d 1320 (CA 2), 94 LRRM 2020 (1977);
Harlem Rivers Consumers Cooperative, Inc., 191 NLRB 314, 77 LRRM 1883
(1971); Commercial Fleet Wash, Inc., 190 NLRB 326, 77 LRRM 1156 (1971);
Emco Steel, Inc., 227 NLRB 148, 94 LRRM 1747 (1977), enf. 95 LRRM 3011
(CA 2) (1977).

1 3. whether the employee's recommendations regarding personnel
2 matters are subject to independent review or investigation by a
3 higher authority;

4 4. whether there are several layers of supervisors above the
5 employee;

6 5. whether a substantial amount of the employee's time is
7 spent doing work which is similar to work of the person he supervises;
8 and

9 6. whether a determination that the position in question
10 were supervisory would create an unrealistic and excessively high
11 ratio of supervisors to employers.²

12 The Captains in the Billings Fire Department were found to
13 have no authority to hire, transfer, lay off, recall, promote,
14 discharge, or reward. Captains could suggest or recommend such
15 action, but the higher authorities made final decisions on any
16 matter of this kind. The Captains also had the authority to
17 impose minor disciplinary measures, were responsible for the
18 activities of their crews and the maintenance of their stations,
19 and could try to resolve informal grievances.

20 The hearing examiner in the Firefighters' case noted that
21 while the duties of the Captains may appear to be indications of
22 supervisory authority, "such involvement in personnel matters must
23 be viewed in the context of the department's structure." (page
24 21, lines 2 & 3). The hearing examiner further reasoned:

25 ". . . Captains are naturally in positions to issue and
26 relay instructions and information, to oversee and
27 report on activities of their crews, and to address
28 some of the matters that arise in their areas. The
29 key to interpreting these responsibilities in terms
30 of supervisory authority is the nature of the work
31 performed, the effectiveness of any recommendations
32 which may be made, and the amount of independent
judgment exercised. (page 21, lines 5-12)

²The NLRB has determined the following supervisor/employee ratios as improper: 8/9 (Commercial Fleet Wash), 3/6-8 (Central Buying Service), 10/27 (Pinecrest Convalescent Home).

1 The hearing examiner found that the Captains perform work
2 which is similar to that performed by their subordinates; that
3 some of the activities they perform and oversee are routine in
4 nature; and that explicit procedures govern nearly every facet of
5 their work. In light of these findings and the previous considera-
6 tions, the Captains were identified properly as leadworkers who,
7 because of their experience and expertise, assumed responsibility
8 for some of the routine functions and acted as conduits for the
9 directives of higher authorities.

10 Similarly, senior officers are properly identified as leadworkers.
11 Senior officers have no independent authority to hire, to fire, or
12 to give raises and other benefits. They have some authority to
13 discipline and adjust grievances, but, this authority can hardly
14 be described as independent. It is because senior officers have
15 no authority to hire or fire, reward or discharge, that any action
16 they might take, such as sending a basic officer home, must be
17 considered only a temporary measure. From Mr. Green's own testimony
18 it is clear that his approval is necessary for a permanent discharge
19 or suspension. Likewise, it would seem that a grievance of any
20 significance, that is, one concerning the transferring, suspending,
21 promoting, discharging, or rewarding employees, must be resolved
22 by the Chief or Airport Director.

23 Does the senior officer exercise independent judgment? He
24 may very well exercise some independent judgment, but he does not
25 exercise independent judgment as that term is used in section
26 39-31-103(3), MCA. The senior officer's use of independent judgment
27 is restricted to those areas in which he has a limited authority:
28 the taking of temporary disciplinary action; routinely assigning
29 shift work, and the adjusting of minor grievances.

30 The degree to which the standing orders guide a senior
31 officer's duties was not made clear at the hearing. However, the
32 mere presence of standing orders necessarily limits a senior

1 officer's independent judgment, and indicates that there are
2 established procedures which guide the Chief and the senior officers
3 in their daily duties.

4 The actual effectiveness of any recommendations made by a
5 senior officer is highly questionable. Mr. Green's own testimony
6 revealed the nature of the recommendations which the senior officers
7 have been instructed to make and how such recommendations would be
8 processed. Senior officers are to "monitor and make recommendations
9 concerning overall operation, detailed procedures, and personnel
10 performance." (See Finding of Fact No. 16) They are to "make
11 observations and report to the Chief." Then the "Chief would
12 analyze it from his perspective and determine if those recommenda-
13 tions were adaptable to the unit." Finally, the Chief would
14 confer with Mr. Green on the matter and then, as Mr. Green said,
15 "we would make a decision to implement it or not."

16 Any recommendation made by a senior officer would therefore
17 be evaluated and analyzed at two higher levels of authority. In
18 this way, any such recommendation by a senior officer would have
19 little effectiveness except as advice. (See Findings of Fact No.
20 17).

21 Mr. Green also stated that the reason he encourages recommen-
22 dations from senior officers is because senior officers are "more
23 likely to be in a position to witness a violation of a standing
24 order than the Chief or myself." The reason for such encouragement,
25 then, is not because of the authority which a senior officer
26 holds, but rather because the senior officer works alongside the
27 basic officers. Moreover, such recommendations are no more than
28 reports on infractions of the standing orders or other misconduct
29 and cannot be considered effective recommendations on personnel
30 matters.

31 Mr. Green further testified that he thought the major difference
32 between the duties of a senior officer and those of a basic officer

1 is that the senior officer may act as a supervisor in the absence
2 of the Chief. Although such a statement seems to indicate a
3 modicum of supervisory authority, it does not provide an adequate
4 ground on which to declare that a senior officer is a supervisory
5 employee.

6 In the first place, from such a statement it must be inferred
7 that when the Chief is present, the duties of the senior officer
8 and the basic officers are generally the same. Secondly, since
9 Mr. Green testified that there would be periods during each day
10 when the senior officer is in charge because the Chief is gone,
11 such periods must be assumed as relatively brief. Such an assump-
12 tion is consistent with basic officer Ochsner's testimony that if
13 the Chief is to be gone for a long period of time, a senior officer
14 is appointed 'Acting Chief'. Since Mr. Ochsner could remember
15 only one such appointment in the last ten months, it must be
16 inferred that a senior officer is not appointed 'Acting Chief'
17 regularly.

18 Lastly, that a senior officer may be considered "in charge"
19 during the absence of the Chief does not necessarily mean that he
20 is a supervisory employee. In NLRB v. Swift & Co., 39 LRRM 2278
21 (1957), that plant clerks performed some supervisory duties in the
22 brief absences of their immediate supervisor was not determinative
23 in light of the facts that the plant clerks had no power to hire,
24 discharge, or even make effective recommendations to the foreman.
25 Likewise, a senior officer's brief exercise of some supervisory
26 duties is not determinative.

27 If the senior officers were considered supervisors along with
28 the Chief and the Airport Director, there would be five supervisors
29 for twelve employees. If the senior officers are not found to be
30 supervisors, the ratio is two supervisors to fifteen employees.
31 Although the ratio of supervisors to employees is not in itself
32 determinative in deciding whether someone is a supervisory employee,

1 following the ratios cited in footnote 2, the 2/15 ratio must be
2 preferred over the 5/12 ratio.

3 In summary, the senior officers cannot be considered supervi-
4 sory employees on the following grounds: the senior officers
5 work alongside the basic officers in the performance of their
6 security and crash-fire duties; work overseen by the senior officers
7 is mostly routine in nature, i.e. the assigning of particular
8 individuals to particular posts; the senior officer's opportunity
9 to exercise independent judgement is limited by the standing
10 orders and the Airport's chain of command; and recommendations
11 made by a senior officer have little or no effectiveness since
12 they are subject to independent review by higher authorities.

13 II. Management Official Issue

14 Section 39-31-103(4) defines "management official" as:
15 a representative of management having authority to act
16 for the agency on any matters relating to the implementa-
tion of agency policy.

17 The only evidence presented which is related to this defini-
18 tion is Mr. Green's testimony that a senior officer in the absence
19 of the Chief, may act as the airport's representative and has the
20 power to request assistance from other agencies. (See Finding of
21 Fact No. 18) Even in its broadest sense, such a characterization
22 falls far short of the statutory definition.

23 A significant body of case law had been developed by the NLRB
24 defining "managerial employees", and listing the reasons for
25 excluding such employees from proposed units. In NLRB v. Textron,
26 416 U.S. 267, 85 LRRM 2945, (1974), the Supreme Court affirmed the
27 NLRB's exclusion of "managerial employees" as those who "formulate
28 and effectuate management policies by expressing and making operative
29 the decisions of their employer." 85 LRRM 2952.

30 A major consideration underlying this definition of "managerial
31 employees" was set down in NLRB v. Retail Clerks International Assn:

32 The rationale for this policy, though unarticulated,
seems to be the reasonable belief that Congress intended

1 to exclude from the protection of the Act those who
2 comprised 'management' or were allied with it on the
3 theory that they were the ones from whom the workers
needed protection. 366 F.2d at 645, 62 LRRM at 2839.

4 There was no evidence that senior officers help in the formula-
5 tion of management policies. They do not effectively participate
6 in management decisions. The rationale for excluding managerial
7 employees or management officials is based on the idea that those
8 who are part of the 'management team' should be excluded. The
9 picture presented to this hearing examiner during the testimony at
10 the hearing did not make senior officers look like they were part
11 of the 'mangement team'; senior officers could not authorize shift
12 changes, much less formulate and effectuate management policy.

13 As noted in the NLRB General Dynamics Corporation decision:

14 . . .managerial status is not conferred upon rank-and-file
15 workers, or upon those who perform routinely, but
16 rather is reserved for those executive-type positions,
those who are closely aligned with management as true
representatives of management. 213 NLRB 124, 87 LRRM
1705 (1974).

17 A senior officer who mans, routinely and daily, security or
18 crash-fire positions can hardly be considered an executive-type
19 position. For these reasons, therefore, a senior officer cannot
20 be considered a management official.

21 CONCLUSIONS OF LAW

22 1. The Senior Public Safety Officers at the Missoula County
23 Airport are not supervisory employees as defined in section
24 39-31-103(3), MCA.

25 2. The Senior Public Safety Officers at the Missoula County
26 Airport are not management officials as defined in section
27 39-31-103(4), MCA.

28 RECOMMENDED ORDER

29 The bargaining unit in the Public Safety Division at the
30 Missoula County Airport shall be comprised of all employees
31 working as Public Safety Officers, including Senior Public Safety
32 Officers, and excluding the Chief of Public Safety.

1 Dated this 2 day of September, 1980.

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4 BOARD OF PERSONNEL APPEALS

5 By Elizabeth L. Griffing
6 Elizabeth L. Griffing
7 Hearing Examiner
8
9

10 CERTIFICATE OF MAILING

11 I, Janifer Jacobsen, do hereby certify and
12 state that I did on the 2nd day of September,
13 1980, mail a true and correct copy of the above Findings of
14 Fact; Conclusions of Law; and Recommended Order to the follow-
15 ing:

14 Patrick McKittrick
15 Suite 315, Davidson Building
16 P.O. Box 1184
17 Great Falls, MT 59403

17 Michael W. Sehestedt
18 Deputy County Attorney
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20 Missoula, MT 59801

21 Janifer Jacobsen

22 PAD3:U
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