

file

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 9-83

MONTANA ASSOCIATION OF FISH)	
AND WILDLIFE BIOLOGISTS,)	
)	
Petitioner,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW
vs.)	AND
)	RECOMMENDED ORDER
STATE OF MONTANA, DEPARTMENT)	
OF FISH, WILDLIFE AND PARKS,)	
)	
Employer.)	

* * * * *

BACKGROUND

On August 31, 1983 Petitioner filed for a new unit determination and election, pursuant to ARM 24.26.612, proposing a bargaining unit comprised of all fulltime employees of the Employer in certain classifications who hold a master's degree in fish and wildlife management or a closely related field, including contract employees. The Employer filed a counter petition on September 14, 1983 disagreeing with the unit proposed by Petitioner and proposed a different unit. A pre-hearing conference was held on October 27, 1983 for purposes of defining and narrowing the issues and discussing procedural matters. Petitioner amended its petition prior to the hearing to propose a unit comprised of all full time employees of the Employer who hold at least a master's degree in fish and wildlife management or a closely related field and who hold positions classified as:

- Fisheries and Wildlife Biologist II
- Fisheries and Wildlife Biologist III
- Fisheries and Wildlife Biologist IV
- Fisheries and Wildlife Biologist Supervisor
- Water Resources Supervisor
- Non-Game Species Biologist

1 Petitioner proposed to exclude all other employees and
2 contended that the proposed unit of approximately 90 emp-
3 loyees is appropriate under Section 39-31-202 MCA.

4 The Employer proposed a bargaining unit made up of all
5 its full time employees who hold positions classified as:

6 Fisheries and Wildlife Biologist I
7 Fisheries and Wildlife Biologist II
8 Fisheries and Wildlife Biologist III

9 The Employer proposed to exclude all supervisory and
10 managerial employees and specifically all positions classi-
11 fied as Fisheries and Wildlife Biologist Supervisor,
12 Fisheries and Wildlife Biologist IV, Water Resources
13 Supervisor and Non-Game Species Biologist. The Employer
14 also proposed to exclude the following positions classified
15 as Fisheries and Wildlife Biologist III alleging they are
16 supervisory:

<u>Position No.</u>	<u>Incumbent</u>
17 15102	Gerald Brown ^a
18 15105	Gerald Salin o s
19 15204	Robert Green
20 15310	Richard DiSimone
35405	Keith Aune
33152	Brad Shepard
35108	Chris Yde

21 The Employer's proposed appropriate bargaining unit
22 would not limit coverage to those employees holding a
23 master's degree.

24 The positions occupied by Brad Shepard and Chris Yde
25 were not specifically identified by the Employer prior to
26 the hearing as positions which it proposed to exclude from
27 the bargaining unit. Petitioner objected to raising them as
28 an issue and to the introduction of evidence related to
29 their exclusion. That objection is hereby overruled for the
30 reason that Petitioner would have been in no better posi-
31 tion, with respect to contesting their exclusion, had the
32 hearing been continued to a later date.

1 A hearing was held on December 7 and 8, 1983 in Helena
2 for the purpose of taking evidence and hearing argument
3 relevant to the appropriate unit for collective bargaining.
4 The Petitioner was represented by its counsel Mr. William L.
5 Madden, Jr. of the law firm of Goetz, Madden and Dunn, P.C.,
6 35 North Grand, Bozeman, Montana, and by Mr. Joseph W.
7 Duffy, attorney at law, P.O. Box 86, Great Falls, Montana.
8 The Employer was represented by its attorney, Mr. Stan
9 Bradshaw of the Montana Department of Fish, Wildlife and
10 Parks, 1420 East Sixth Avenue, Helena, Montana, and by Mr.
11 Caleb Mills of the Montana Department of Administration,
12 Labor Relations Bureau, Room 130, Mitchell Building, Helena,
13 Montana.

14
15 ISSUES

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17 The primary issue raised by the filing of the petition
18 in this matter is: what is the appropriate bargaining unit
19 for the purpose of collective bargaining, pursuant to Sec-
20 tion 39-31-202 MCA, for certain employees of the Montana
21 Department of Fish, Wildlife and Parks? The specific ques-
22 tions brought by the dispute between the parties over the
23 appropriateness of the unit proposed by the Petitioner and
24 the unit proposed by the Employer are as follows:

- 25
- 26 1. Should the unit include only those positions held
27 by employees in certain classifications who hold
at least a master's degree in fish and wildlife
management or a closely related field?
 - 28 2. Should the Fisheries and Wildlife Biologist I
29 classification be included in the appropriate
bargaining unit?
 - 30 3. Are those seven positions classified as Fisheries
31 and Wildlife Biologist III, which the Employer
proposes to exclude, supervisory?
 - 32 4. Should the classification of Fisheries and
Wildlife Biologist IV, Fisheries and Wildlife

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4. The hours of work, fringe benefits and working conditions of all employees who occupy positions in the seven classifications, proposed either by the Petitioner or the Employer to be included in the appropriate unit, are similar.

5. There has been no history of collective bargaining among employees who are proposed to be included in either the Petitioner's unit or the Employer's unit.

6. There is no common supervision of all the employees in either proposed unit, except to the extent the Director indirectly supervises them through his subordinates.

7. All employees in the proposed units are under the personnel policies of the Montana Department of Fish, Wildlife and Parks and the Montana Department of Administration, Personnel Division.

8. On December 23, 1981 the Director issued a memorandum to all employees of the department setting forth areas of responsibility for, among others, Regional Supervisors. The memorandum bestowed responsibility for daily activities of regional personnel upon the Regional Supervisor and specifically provided:

. . .

This will include authority for: hiring and firing of personnel, direct supervision of work schedules, evaluation of regional personnel, coordination of work schedules and fiscal accounting.

The Supervisor will develop and maintain an effective network of communications amongst the Director's Office, regional personnel, other state and federal agencies, as well as the public.

9. In actual practice the Regional Supervisors do not have authority to hire or fire because such decisions are reviewed at one or more levels of the organization before final approval is made by the Director.

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10. When a vacancy is to be filled in a biologist position in one of the regions a panel is formed to do the interviewing and to recommend a person to be hired. The panel may be comprised of the appropriate fisheries or wildlife manager (Fisheries and Wildlife Supervisor) and the Regional Supervisor or the appropriate fisheries or wildlife manager, the Regional Supervisor and the Division Administrator.

11. Where the Division Administrator does not sit on the panel a recommendation is sent to him. He reviews the recommendation and, if he agrees with it, he forwards it to the Director. If he disagrees he sends both his recommendation and that of the panel to the Director.

12. Generally, where the Division Administrator sits on the panel one recommendation is sent to the Director. If there is a split between the Administrator and the other panel members, both recommendations are sent to the Director. The views of each panel member are given equal weight in the process.

13. Where there is a vacancy in a biologist position under the authority of a Bureau Chief, the interview and recommendation process is conducted by a panel comprised of a Fisheries and Wildlife Biologist Supervisor, the Regional Supervisor and the Bureau Chief. The panel's recommendation goes to the Division Administrator who reviews it and sends it on to the Director, if the Administrator agrees with it. If he does not agree with the panel's recommendation he sends his own recommendation along with that of the panel to the Director, who makes the final decision. Each panel member's opinion is accorded equal weight.

14. Promotions, transfers, suspension and discharges are conducted in a fashion similar to the hiring process

1 described above inasmuch as no one individual beneath the
2 Director has authority to make a final decision.

3 15. No employee in either of the proposed units has
4 authority to lay off or recall another employee unless it is
5 done in accordance with Policy 3-0155 "Reduction in Force".
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7 16. The department has not had experience with rewards
8 of employees which would be pertinent to any issues in this
9 matter.

10 17. No employee in either of the proposed units has
11 authority to invoke punitive discipline against another
12 employee unless Policy 3-0125 is followed.

13 18. The Fisheries and Wildlife Biologist I classifi-
14 cation encompasses duties performed by biologists at the
15 entry professional level and it requires minimum qualifica-
16 tions of a bachelor's degree in fish and wildlife management
17 or a closely related field. No experience is required. The
18 position is usually filled by a person with a master's
19 degree.

20 19. It is unlikely the department will employ a
21 fisheries and wildlife biologist who possesses less than a
22 master's degree, however, persons have been hired at the
23 Fisheries and Wildlife Biologist I level with a master's
24 degree and a few individuals with only a bachelor's degree
25 have advanced through the ranks to assume responsible higher
26 level positions in the Department.

27 20. The general classification of Fisheries and Wild-
28 life Biologist II describes duties performed by professional
29 biologists and requires a master's degree in fish and wild-
30 life management or a closely related biological science. No
31 experience is required.

32 21. Fisheries and Wildlife Biologist III's, as a
class, perform professional duties in carrying out assigned

1 segments of broad and complex biological management or
2 research studies. They work under general supervision and
3 exercise supervision over personnel as assigned. A master's
4 degree in fish and wildlife management or related biological
5 science is required plus two years experience.

6 22. Position No. 15102, Fisheries and Wildlife
7 Biologist III is occupied by Gerald Brown. He makes routine
8 work assignments to a Fisheries and Wildlife Biologist II,
9 he monitors and evaluates his work and he signs his payroll
10 sheet.

11 23. Position No. 15105, Fisheries and Wildlife
12 Biologist III is occupied by Gerald Salinas. There is no
13 evidence on the record from which a conclusion can be made
14 that he has supervisory duties.

15 24. Position No. 15204, Fisheries and Wildlife
16 Biologist III, is occupied by Robert Green. There is no
17 evidence on the record from which a conclusion can be made
18 that he has supervisory duties.

19 25. Position NO. 15310, Fisheries and Wildlife
20 Biologist III, is occupied by Richard DiSimone. He makes
21 routine work assignments to a Fisheries and Wildlife
22 Biologist II, and he evaluates his work.

23 26. Position No. 35405, Fisheries and Wildlife
24 Biologist III, is occupied by Keith Aune. He makes routine
25 work assignments to a Fisheries and Wildlife Biologist I and
26 to seasonal workers and he evaluates their work.

27 27. Position No. 33152, Fisheries and Wildlife
28 Biologist III, is occupied by Brad Shepard. He makes rout-
29 ine work assignments to other personnel and evaluates their
30 work.

31 28. Position No. 35108, Fisheries and Wildlife
32 Biologist III, is occupied by Chris Yde. He makes routine

1 work assignments to a Fisheries and Wildlife Biologist II
2 and evaluates his work.

3 29. None of the seven Fisheries and Wildlife Biologist
4 III positions at issue here has authority to take indepen-
5 dent action on any non-routine, out of the ordinary per-
6 sonnel matter. Any decision regarding personnel actions
7 taken by any one of them is subject to review at numerous
8 higher levels of the organization.

9 30. Any recommendation regarding non-routine personnel
10 matters made by any of the seven Fisheries and Wildlife
11 Biologist III's is reviewed independently at higher levels
12 in the department.

13 31. The class specification for Fisheries and Wildlife
14 Biologist IV describes the general work of those positions
15 as supervisory and professional in carrying out regional or
16 statewide segments of broad and complex biological manage-
17 ment or research studies. They work under general super-
18 vision and exercise supervision over professional personnel
19 as assigned. A master's degree in fish and wildlife man-
20 agement or a related biological science is required in
21 addition to three years experience.

22 32. Any non-routine personnel action taken by a
23 Fisheries and Wildlife Biologist IV is subject to indepen-
24 dent review by persons holding higher level positions in the
25 heirarchy. They do, however, make routine work assignments
26 to subordinates as assigned. Recommendations made by them
27 are of a routine nature and do not entail the use of inde-
28 pendent judgment. All such recommendations are reviewed by
29 their superiors.

30 33. The class specification for Fisheries and Wildlife
31 Biologist Supervisor describes the general work of those
32 positions as administrative, supervisory and professional in

1 directing a total regional fisheries or wildlife management
2 program or a statewide program in a discrete phase of
3 fisheries or wildlife management. They work under general
4 guidance and direction and exercise supervision over pro-
5 fessional personnel. The positions require a master's
6 degree in fish and wildlife management and three years of
7 experience.

8 34. The parties agreed that Position No. 15809,
9 Fisheries and Wildlife Biologist Supervisor, is supervisory
10 and should be excluded from the appropriate bargaining unit.

11 35. Position Nos. 15906 and 15808, Fisheries and
12 Wildlife Supervisors, have no professional subordinates
13 assigned to them. They do, however, have technical and
14 clerical personnel assigned to them.

15 36. All other Fisheries and Wildlife Biologist Super-
16 visors have professional subordinates assigned to them
17 ranging in number from two to nine. It appears that the
18 average number of professional subordinates per Supervisor
19 is about three and one-half.

20 37. Fisheries and Wildlife Biologist Supervisors sit
21 on hiring panels comprised of themselves and others, how-
22 ever, their opinion is given no greater weight than that of
23 any other panel member. Recommendations made by the panels
24 are reviewed independently by at least two higher levels in
25 the organization.

26 38. Fisheries and Wildlife Biologist Supervisors
27 assign and direct routine work of their subordinates.
28 Non-routine work assignments and directions come from the
29 Regional Supervisor, a Bureau Chief or a Division
30 Administrator.

31 39. Recommendations on promotions made by Fisheries
32 and Wildlife Biologist Supervisors do not entail the use of

1 independent judgment because such promotions are automatic
2 and require only that the department be able to justify them
3 on paper.

4 40. All recommendations on extraordinary personnel
5 actions made by Fisheries and Wildlife Biologist Supervisors
6 are independently reviewed by their superiors in the orga-
7 nization.

8 41. Many of the decisions on particular tasks to be
9 accomplished made by a Fisheries and Wildlife Biologist
10 Supervisor and other Fisheries and Wildlife Biologists in a
11 region are made collegially among themselves.

12 42. Performance evaluations completed by any Fisheries
13 and Wildlife Biologist are reviewed by persons at higher
14 levels.

15 43. All Fisheries and Wildlife Biologists hire tem-
16 porary summer help.

17 44. The class specification for the Water Resources
18 Supervisor position describes its general duties as the
19 planning and performing of required acts and procedures in
20 the preparation of department filings for preservation of
21 stream flows. The individual works under general guidance
22 and direction and exercises supervision over technical
23 personnel. A master's degree in aquatic biology, ecology or
24 a closely related field and three years of experience is
25 required.

26 45. Decisions regarding non-routine personnel actions
27 taken by the Water Resources Supervisor are reviewed inde-
28 pendently by his superiors in the department.

29 46. The class specification for the Non-game Species
30 Biologist position lists its duties as administrative and
31 technical related to the independent implementation of the
32

1 non-game species program. The incumbent works under broad
2 policy guidance and exercises supervision over clerical
3 personnel. A master's degree in fish and wildlife manage-
4 ment or biology and three years of experience is required.

5 47. The Non-game Species Biologist has no professional
6 employees under him.

7 48. None of the employees in either of the proposed
8 bargaining units has authority to speak for the department
9 or one of its divisions on matters related to broad policy
10 interpretation. None of them formulate or effectuate
11 policy.

12 49. None of the employees in either proposed bar-
13 gaining unit has authority to hire, transfer, suspend, lay
14 off, recall, promote, discharge, reward, discipline or
15 adjust grievances. They may make recommendations relative
16 to those personnel actions, but such recommendations are
17 given independent review and consideration by their supe-
18 riors.

19 50. Some of the employees who occupy positions at
20 issue here assign and direct the work of subordinate emp-
21 loyees, however, such work is routine and not out of the
22 ordinary. The assignment and direction for pursuing non-
23 routine tasks come from higher level officials in the de-
24 partment.

25 51. All employees who hold positions alleged to be
26 supervisory by the employer spend a significant amount of
27 their time doing the same kind of work as their subordi-
28 nates.

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OPINION

THE FISHERIES AND WILDLIFE BIOLOGIST I
AND THE MASTER'S DEGREE CRITERION

The Board of Personnel Appeals has in the past looked to those factors set forth in Section 39-31-202 MCA in determining whether certain employees or groups of employees should be included in or be excluded from an appropriate bargaining unit. Specifically, the factors enumerated are: community of interest, wages, hours, fringe benefits, and other working conditions, bargaining history, common supervision, common personnel policies, extent of integration of work functions and interchange among the employees.

Unlike the National Labor Relations Act, Montana's Collective Bargaining for Public Employees Act does not make special provision for the treatment of professional employees in the representation process. Section 9(b)(1) of the NLRA prohibits bargaining units of both professionals and other employees unless a majority of the professionals vote for inclusion in the unit. Section 2(12) of the NLRA defines professional employee. Since our Act does not treat professional employees differently from other employees and because the Board of Personnel Appeals has looked to the factors set forth in Section 39-31-202 MCA in determining the appropriateness of proposed bargaining units, the question of limiting membership in the unit to holders of a master's degree or a higher degree must be resolved around the question of whether they have^a substantial mutuality of interest in wages, hours and working conditions, i.e., do they share a similar community of interest? The Board in making unit determinations seeks an employee group which is

1 united by its common interests and which neither embraces
2 employees having a substantial conflict of economic interest
3 nor omits employees sharing a unity of economic interest.
4 Teamsters Local 448 v. Columbia Falls School District No. 6,
5 UD 8-77; Montana Federation of Teachers and Montana Public
6 Employees Association v. Kalispell School District No. 5, UD
7 1-80; Montana Education Association, EMC Faculty Bargaining
8 Coalition v. Eastern Montana College, UD 66-75.

9 An examination of the facts of the instant case compels
10 the conclusion that the unit should not be limited to those
11 persons with a master's degree or higher degree. Although
12 it is not likely that the department will employ a person in
13 any of the positions at issue who does not have a master's
14 degree, if it did, that person would have the same interest
15 in wages, hours and working conditions as those employees in
16 the proposed unit. To exclude the Fisheries and Wildlife
17 Biologist I position simply because it only requires a
18 bachelor's degree would not seem prudent in light of the
19 fact that a biologist with a master's degree could be
20 employed to fill a vacancy there. If the position were not
21 in the unit, he would be deprived of his right to bargain
22 collectively.

23 Further, the Fisheries and Wildlife Biologist I posi-
24 tion is the first step in a logical career ladder pro-
25 gressing on up through the higher levels of biologist. Even
26 though the person at the I level does not function at the
27 same height of professionalism as do the II's and above, he
28 still has a community of interest with them in promoting
29 wages, hours and working conditions. Petitioner's desire to
30 promote itself as an association of professional biologists
31 is commendable; however, the Board must make unit deter-
32 minations to assure that employees may exercise their right

1 to bargain collectively and engage in other related
2 activities permitted under Section 39-31-201 MCA.
3

4 THE SUPERVISORY QUESTIONS
5

6 Section 39-31-103(2)(b) MCA excludes supervisory
7 employees from the definition of public employee and,
8 thereby, removes them from the coverage of the Collective
9 Bargaining for Public Employees Act. Section 39-31-103(3)
10 MCA defines a supervisory employee as:
11

12 . . . any individual having authority in the
13 interest of the employer to hire, transfer,
14 suspend, lay off, recall, promote, discharge,
15 assign, reward, discipline other employees, having
16 responsibility to direct them, to adjust their
17 grievances, or effectively recommend such action,
18 if in connection with the foregoing the exercise
19 of such authority is not of a merely routine or
20 clerical nature but requires the use of indepen-
21 dent judgment.
22

23 The word "supervisor" is defined in Section 2(11) of
24 the National Labor Relations Act and is essentially iden-
25 tical to the wording in Section 39-31-103(3) MCA. The Board
26 of Personnel Appeals has looked to National Labor Relations
27 Board and federal court decisions as instructive on the
28 meaning of Montana's statute.
29

30 The National Labor Relations Board has long held that,
31 because the enumerated personnel actions contained in the
32 statute are listed in the disjunctive, possession of any one
33 of them is sufficient to make an employee a supervisor.
34 NLRB v. Broyhill Co., 514 F.2d 655, 89 LRRM 2203 (8th CA,
35 1975); NLRB v. Metropolitan Life Insurance Co., 405 F.2d
36 1169,70 LRRM 2029 (2nd CA, 1968).
37

38 The National Labor Relations Board does, however,
39 distinguish between true supervisors and straw bosses, lead
40

1 workers and other minor supervisory employees. NLRB v.
2 Security Guard Service Inc., 384 F. 2d 143, 66 LRRM 2247
3 (5th CA, 1967). The status of supervisory employee is not
4 to be construed so broadly that persons are denied employee
5 rights which the statute was designed to protect. NLRB v.
6 Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974);
7 Westinghouse Elec. Corp v. NLRB, 424 F.2d 1151, 74 LRRM 2070
8 (7th CA, 1970), cert. denied 400 U.S. 831, 75 LRRM 2379
9 (1970).

10 Certain well established principles have been developed
11 in the federal sector for determining who are supervisory
12 employees under the National Labor Relations Act. In
13 Security Guard Service, supra, the court held that to be a
14 supervisor an employee must have authority to use indepen-
15 dent judgment in performing supervisory functions in the
16 interest of management.

17 An employee is not a supervisor when he has the power
18 to exercise or effectively recommend the exercise of one of
19 the functions unless such power is accompanied by authority
20 to use independent judgment in determining how, in the
21 interest of management, it will be exercised. Authority to
22 perform one of the functions is not supervisory if the
23 responsibility is routine or clerical. NLRB v. Wentworth
24 Institute, 515 F. 2d 550, 89 LRRM 2033 (1st CA, 1975);
25 NLRB v. Metropolitan Petroleum Co., 506 F.2d 616, 87 LRRM
26 3139 (1st CA, 1974).

27 For supervisory status to exist, the position must
28 substantially identify the employee with management. NLRB
29 v. Doctor's Hospital of Modesto, Inc., 489 F.2d 772, 85 LRRM
30 2228 (9th CA, 1973).

31 An employee may have potential powers, but theoretical
32 or paper power will not make him a supervisor. Tables of

1 organization and job description do not vest powers. Some
2 kinship to management, some empathic relationship between
3 employer and employee must exist before the employee becomes
4 a supervisor for the employer. NLRB v. Griggs Equipment,
5 Inc., 307 F.2d 275, 51 LRRM 2020 (5th CA, 1962).

6 The degrees of authority to direct the work of others
7 vary from that of a general manager or other top executive
8 to lead workers. The gradations are so infinite and subtle
9 that the federal courts have given the National Labor
10 Relations Board a large measure of informed discretion in
11 exercising its responsibility to determine who is a super-
12 visor. NLRB v. Swift and Co., 292 F.2d 561, 48 LRRM 2695
13 (1st CA, 1961).

14 When an employee merely acts as a conduit for orders
15 which emanate from superiors he is performing routine tasks.
16 Screwmatic, Inc., 218 NLRB No. 210, 89 LRRM 1508 (1975).
17 The title carried by a position has little bearing on whe-
18 ther it is supervisory. It is the function rather than the
19 label that is significant. Bell Aerospace, supra; Phillips
20 v. Kennedy, 542 F.2d 52, 93 LRRM 2353 (8th CA, 1976).

21 Directing and assigning work by a skilled employee to
22 less skilled employees does not involve the use of indepen-
23 dent judgment when it is incidental to the application of
24 the skilled employee's technical or professional knowledge.
25 In such a situation the skilled employee does not exercise
26 independent judgment as a representative of management
27 within the meaning of the statutory requirement. Westing-
28 house Elec. supra; Arizona Public Service Co. v. NLRB, 453
29 F.2d 228, 79 LRRM 2099 (9th CA, 1971).

30 It is the employee's regular functions, not temporary
31 or occasional service as a supervisor that is determinative
32

1 of status. NLRB v. Harmon Industries, Inc., 565 F. 2d 1047,
2 96 LRRM 3198 (8th CA, 1977).

3 The Iowa Public Employee Relations Board defines an
4 effective recommendation as one which, under normal circum-
5 stances and policy, is made at the chief executive level or
6 below and is adopted by higher authority without independent
7 review or de novo consideration as a matter of course. In
8 City of Davenport v. PERB, 264 N.W. 2d 307, 98 LRRM 2582
9 (1978) the Iowa Supreme Court endorsed the Board's defini-
10 tion and noted that a mere showing that recommendations are
11 followed does not make them "effective" within the meaning
12 of the Iowa statute. The City of Davenport case was cited
13 and its principles were adopted by this Board in Department
14 of Administration v. MPEA, UC 6-80.

15 Assigning employees to work on a routine basis is
16 insufficient reason to create supervisory status because it
17 does not require the use of independent judgment. NLRB v.
18 McQuaide, Inc., 552 F.2d 519, 94 LRRM 2950 (3rd CA, 1977);
19 Harmon Industries, supra.

20 The following considerations for determining super-
21 visory status were recommended by the hearing examiner and
22 later adopted by this Board in Billings Firefighters Local
23 521 v. City of Billings, UC 1-77:

24
25 °Whether the employee has independent authority to
26 perform the functions enumerated in the Act.

27 °Whether the exercise of authority in the area of
28 assignment and direction is routine.

29 °Whether the employee uses independent judgment in
30 directing the activities of others.

31 °Whether the recommendations made by the employee are
32 subject to independent review or investigation.

°Whether a substantial amount of the employee's time is
spent doing work which is similar to the work of the
subordinates.

1 °Whether an unrealistic and excessively high ratio of
2 supervisors to employees would be created. (citations
3 omitted)

4 Under the above-noted principles it is difficult to
5 find that any of the persons who hold positions at issue in
6 this matter are supervisors. None of them, either directly
7 or by effectively recommending, performs any of the func-
8 tions enumerated in Section 39-31-103(3) MCA. Moreover,
9 none use independent judgment in assigning and directing the
10 work of subordinates. Some of the position incumbents
11 assign and direct routine work, however, non-routine or out
12 of the ordinary work assignments come from higher levels in
13 the organization such as the Regional Supervisor, Bureau
14 Chief or Division Administrator. Even performance evalua-
15 tions completed by employees in the contested positions are
16 reviewed by their superiors. And, at least one of the
17 Fisheries and Wildlife Biologist Supervisors viewed the task
18 of completing evaluations as nothing more than a clerical
19 job.

20 Although the Employer uses the word "supervisory" on
21 the class specification for two of the classes of positions
22 in dispute, the Fisheries and Wildlife Biologist Supervisor
23 and the Water Resources Supervisor, they are not supervisors
24 as that word is used in Section 39-31-103(3) MCA. Categor-
25 izing employees as supervisory for purposes of classifica-
26 tion is of little significance to a proper determination of
27 their status under the Collective Bargaining for Public
28 Employees Act. It is the actual nature of the work being
29 performed by the employees that is significant. With re-
30 spect to the employees in the questioned positions, no
31 significant amount of their work is supervisory. True
32 supervisory functions may well be exercised by the Regional

1 Supervisors and by Bureau Chiefs, but it is not exercised by
2 employees in lower positions.

3 Completion of analysis requires an examination in the
4 question of whether any of the employees are management
5 officials pursuant to Section 39-31-103(4) MCA, where the
6 term is defined as "a representative of management having
7 authority to act for the agency on any matters relating to
8 the implementation of agency policy."

9 Although the National Labor Relations Act does not
10 exclude management officials, the National Labor Relations
11 Board has for many years excluded them from bargaining
12 units. The U.S. Supreme Court said, in Bell Aerospace Co.,
13 supra, that managerial employees were not covered by the
14 Act. The Court went on to approve the "exclusion of such
15 employees based on a determination of whether they formu-
16 late, determine and effectuate an employer's policies, if
17 they use discretion in performing their jobs and are not
18 required to exercise that discretion in conformity with the
19 employer's established policy."

20 In General Dynamics Corp., Convair Aerospace Div., 213
21 NLRB 124, 87 LRRM 1705 (1974) the National Labor Relations
22 Board reviewed the alleged managerial status of certain
23 employees in the aerospace industry and concluded that:

24 . . . managerial status is not conferred
25 upon rank-and-file workers, or upon
26 those who perform routinely, but rather
27 is reserved for those in executive-type
28 positions, those who are closely aligned
29 with management as true representatives
30 of management. Work which is based on
31 professional competence necessarily
32 involves a consistent exercise of dis-
cretion and judgment, else professiona-
lism would not be involved. Never-
theless, professional employees plainly
are not the same as management employees
either by definition or in authority,
and managerial authority is not vested
in professional employees merely by
virtue of their professional status, or

1 because work performed in that status
2 may have a bearing on company direction.
3 Likewise, technical expertise in admin-
4 istrative functions which may involve
5 the exercise of judgment and discretion
6 does not confer executive-type status
7 upon the performer. . .

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General Dynamics Corp., supra,
87 LRRM at 1715

7 An application of the above principles to the facts
8 relevant to the duties and responsibilities of the employees
9 who occupy the positions in controversy here forces the
10 conclusion that none has managerial status. They do not
11 have authority to fomulate, determine or effectuate agency
12 policies by using discretion. The employees whose positions
13 are in question are lead workers who perform much the same
14 kind of work as their subordinates, they are not executive
15 types who are involved in high level policy formulation and
16 implementation.

17
18 CONCLUSION OF LAW
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20 Pursuant to Section 39-31-202 MCA, the unit appropriate
21 for the purpose of collective bargaining for certain emp-
22 loyees of the Montana Department of Fish, Wildlife and Parks
23 is one comprised of all full-time employees who occupy
24 positions classified as:

25 Fisheries and Wildlife Biologist I
26 Fisheries and Wildlife Biologist II
27 Fisheries and Wildlife Biologist III
28 Fisheries and Wildlife Biologist IV
29 Water Resources Supervisor
30 Biologist, Non-game Species
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29 Position No. 15809, Fisheries and Wildlife Biologist
30 Supervisor, and all other employees are excluded from the
31 bargaining unit.
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RECOMMENDED ORDER

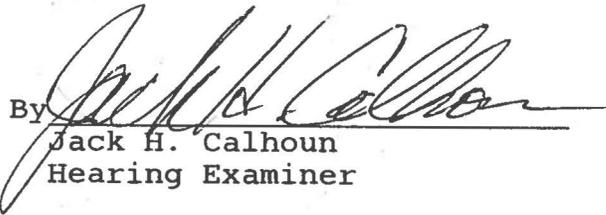
A secret ballot election among those employees in the appropriate unit is hereby directed.

NOTICE

Exceptions to these findings of fact, conclusions of law and recommended order may be filed within twenty days of service thereof. If no exceptions are filed this recommended order will become the order of the Board of Personnel Appeals.

Dated this 4th day of April, 1984.

BOARD OF PERSONNEL APPEALS

By 
Jack H. Calhoun
Hearing Examiner

* * * * *
CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 4th day of April, 1984:

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