

STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NOS. 15 AND 19-87:

BOARD OF REGENTS, MONTANA)
UNIVERSITY SYSTEM,)
Employer,)
MONTANA FEDERATION OF)
TEACHERS,)
Incumbent Union,)
MAINTENANCE EMPLOYEES, BUTTE)
VOCATIONAL TECHNICAL CENTER,)
Petitioner,)
AMALGAMATED TRANSIT UNION,)
Incumbent Union,)
OPERATING ENGINEERS NO. 375,)
Incumbent Union,)
OPERATING ENGINEERS NO. 400,)
Incumbent Union,)
CULINARY WORKERS' UNION,)
Incumbent Union,)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES,)
Incumbent Union,)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
Incumbent Union.)

FINAL ORDER

* * * * *

1 employees at issue, other than chief fiscal officers, are covered
2 by the Collective Bargaining for Public Employees Act.

3 The Montana Vo-Tech Maintenance Employees Council and the
4 Board of Regents of the Montana University System each filed
5 Exceptions to the Findings of Fact, Conclusions of Law and
6 Recommended Order on May 20, 1988. The Council objects to the
7 determination of the hearing examiner that its Petition to
8 Intervene was not timely filed. The Council further objects to
9 the "placement of the Montana Federation of Teachers upon the
10 ballot for the proposed maintenance unit." The Board of
11 Regents' exceptions are limited to the determination of the
12 hearing examiner that the chief engineer position at the
13 Missoula Vocational Technical Center is not a supervisory or
14 management position pursuant to Sections 39-31-103(3) and (4),
15 MCA.

16 Briefs were filed in support of the exceptions and oral
17 arguments were heard before the Board of Personnel Appeals on
18 Friday, June 24, 1988.

19 ORDER

20 Upon reviewing the record, including the transcript excerpts
21 provided by the Board of Regents, and considering the briefs and
22 oral arguments, the Board orders as follows:

- 23 1. The Board affirms the determination of the hearing
24 examiner that the Council's Petition to Intervene was untimely.

1 Consideration of the Council's second objection is therefore
2 unnecessary.

3 2. The Board affirms all factual findings of the hearing
4 examiner except Finding of Fact #1 under "The Chief Engineer/
5 Head Custodian Positions" on page 8 of the Order. That finding
6 is amended to conform to the evidence as follows:

7 1. The chief engineer at the Missoula
8 Vocational Center reports to the chief fiscal
9 officer. He only becomes involved personally
10 in extraordinary maintenance work. His
11 primary responsibility is to direct seven
12 custodians. He also directs work study
13 students. He sits on the interview team for
14 hiring and he approves overtime and leave.

15 "The chief engineer is completely responsible for first
16 level disciplinary action and is responsible for making
17 recommendations concerning the firing of employees under him.

18 "The chief engineer has ultimate authority to enter into a
19 contract with a private contractor. He is also responsible for
20 determining and ordering the supplies and equipment necessary for
21 the operation of the physical plant.

22 "Approximately eighty to ninety percent of the chief
23 engineer's time is spent performing administrative functions.

24 "The chief engineer is not currently in the bargaining unit.
25 After July 1, 1989, his duties will become even less maintenance
oriented and more administrative in nature."

3. The hearing examiner's Discussion is amended to include
the following statements and to exclude anything not in conform-
ity therewith.

1 "The chief engineer has substantial independent authority
2 and uses his independent judgement in performing his functions.
3 He exercises his own judgement in determining and ordering the
4 equipment and supplies necessary to operate the physical plant.
5 He sits on a small interview committee and has input in hiring
6 decisions. He is completely responsible for initial disci-
7 plinary actions and is responsible for effectively recommending
8 the discharge of his subordinates.

9 "The chief engineer's authority is not directed solely to
10 routine matters. He not only assigns specific duties to his
11 subordinates, but also makes hiring and firing decisions,
12 adjusts grievances, and places purchasing orders.

13 "Only a small amount of the chief engineer's time is spent
14 doing work similar to that of his subordinates. Nearly all
15 maintenance work performed by the chief engineer is extraordinary
16 in nature or in response to an emergency situation.
17 Approximately eighty to ninety percent of his time is spent on
18 administrative duties and responsibilities.

19 "From the above, it is clear that the chief engineer
20 position is a supervisory position under Section 39-31-103(3),
21 MCA, and the test adopted by this Board in Billings Firefighters
22 Local No. 521 v. City of Billings, U.C. 1-77."

23 4. The Board affirms all Conclusions of Law of the hearing
24 examiner except Conclusion of Law #6. The Board affirms
25 Conclusion of Law #6 only insofar as it relates to the head

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custodial position at the Billings Center. The Board strikes the remainder of Conclusion of Law #6.

5. The Board adopts the following conclusion of law as Conclusion of Law #7.

"7. The chief engineer position at the Missoula Vocational Technical Center is a supervisory position pursuant to Section 39-31-103(3), MCA. The chief engineer position is therefore excluded from the bargaining unit."

DATED this 23rd day of August, 1988.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 24th day of August, 1988:

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15 OPERATING ENGINEERS NO. 400,)
16 Incumbent Union,)
17 CULINARY WORKERS' UNION,)
18 Incumbent Union,)
19 AMERICAN FEDERATION OF STATE,)
20 COUNTY AND MUNICIPAL)
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21 Incumbent Union,)
22 MONTANA PUBLIC EMPLOYEES)
23 ASSOCIATION,)
24 Incumbent Union.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

INTRODUCTION

Petitions for new unit determination and election were filed by the Montana Education Association on August 28, 1987, and by the Board of Regents of the Montana University System, on September 4, 1987, pursuant to Section 20-16-107(3) MCA. The Montana Education Association later withdrew its petition and is no longer a party to these proceedings.

1 On September 9, 1987 we issued a Notice of Unit
2 Determination Proceedings describing the bargaining unit
3 proposed by the Montana Education Association and advising
4 prospective intervenors of the deadline, October 2, 1987,
5 for filing petitions. All incumbent unions captioned above
6 were served with the notice. The notices were posted by
7 personnel in the five vocational technical centers.

8 A pre-hearing conference was held on November 24, 1987.
9 Another pre-hearing conference was held on January 4, 1988.
10 At the second conference all parties agreed that the only
11 issues in dispute regarding the composition of the proposed
12 bargaining units were those listed below under ISSUES.

13 On January 18, 1988 we received a petition from four
14 unions: Operating Engineers No. 375, Operating Engineers
15 No. 400, Hotel and Restaurant Employees No. 457 (Culinary
16 workers) and the American Federation of State, County and
17 Municipal Employees. The petitions sought, as one group, to
18 intervene in this unit determination proceeding as the
19 Montana Vo-Tech Maintenance Employees Council.

20 A hearing was held on January 25 and 26, 1988. The
21 Board of Regents was represented by Sue Romney; the Montana
22 Public Employees Association was represented by Dave
23 Stiteler; the Montana Federation of Teachers was represented
24 by Matt Thiel; and the Operating Engineers Locals No. 375
25 and 400, the Hotel and Restaurant Employees No. 457 and the
26 American Federation of State, County and Municipal Employees
27 were represented by Pat McGee.

28 PETITION TO INTERVENE

29 The petition to intervene by the four incumbent unions,
30 the Montana Vo-Tech Maintenance Employees Council, is hereby
31 denied because it was not timely filed in accordance with
32 24.26.618 ARM which states, in part:

1 PETITION TO INTERVENE (1) Within twenty (20)
2 days from the first day of posting of the Notice
3 of Unit Determination proceedings, any labor
4 organization or group of employees may file a
5 Petition to Intervene...

6 All four unions had notice of the deadline for filing
7 intervenor petitions and the notice of this unit determina-
8 tion proceeding was posted in all five vocational technical
9 centers. The deadline to file was October 2, 1987. The
10 Petition to Intervene was not filed until January 18, 1988.

11 ISSUES

12 The issues left unresolved by the parties and upon
13 which testimony and other evidence were taken are as fol-
14 lows:

- 15 1. Whether the appropriate bargaining unit
16 for certain classified employees of the
17 five vocational technical centers should
18 be: (a) one unit of all such employ-
19 ees, or (b) one unit of custodial,
20 maintenance and food service employees
21 and one unit of clerical employees.
- 22 2. Whether the secretaries to the vocation-
23 al technical center directors are
24 supervisory or confidential employees.
- 25 3. Whether the positions known variously as
26 supervisor of administrative affairs,
27 business officer, fiscal officer and
28 accounting supervisor are management,
29 supervisory or confidential.
- 30 4. Whether the head bookkeeper position at
31 the Missoula center is managerial,
32 supervisor or confidential.

- 1 5. Whether the positions known as either
2 chief engineer or head custodians are
3 managerial or supervisory.
4 6. Whether two employees who handle parts
5 in the Helena center are management or
6 supervisory or have a community of
7 interest with other employees in the
8 center.

9 FINDINGS OF FACT

10 The Appropriate Unit(s)

11 1. The secretarial/clerical employees who work at the
12 five vocational technical centers perform duties such as
13 typing, filing, copying, answering telephones, greeting
14 visitors, doing bookkeeping and assisting professionals and
15 others. They work a day shift in an office atmosphere.

16 2. Custodians, maintenance and food service people
17 perform manual or skilled labor-type work such as cleaning
18 buildings and grounds and maintaining facilities. They work
19 various shifts both inside and outside.

20 3. There is no interchange of employees from clerical
21 to custodial/maintenance or from custodial/maintenance to
22 clerical.

23 4. Clerical personnel are not supervised by the same
24 individuals as are custodial/maintenance personnel.

25 5. The fringe benefits of the two groups are essen-
26 tially the same.

27 6. Custodial/maintenance personnel make higher wages
28 than do clerical personnel.

29 7. There is no integration of the work function of
30 two groups.
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1 8. There was insufficient evidence presented to
2 conclude that the employees involved desire one or two
3 units.

4 9. There are a total of approximately 55 nonprofes-
5 sional employees in the vocational technical system: (1)
6 17 in Missoula, (2) 10 in Helena, (3) 10 in Butte, (4) 10
7 in Billings, and (5) 8 in Great Falls.

8 10. The Board of Regents proposed to exclude from the
9 55 employees a total of 16 because they are supervisory,
10 managerial or confidential.

11 The Five Secretary Positions

12 1. The Administrative Secretary at the Missoula
13 Vocational Technical Center reports directly to the center
14 director. She performs secretarial duties in such areas as
15 typing correspondence, filing, compiling data, processing
16 employment applications and assisting the director in
17 general. She has no supervisory responsibilities. She has
18 access to confidential files related to labor relations
19 matters and she deals with personnel matters.

20 2. The Administrative Secretary at the Billings
21 Vocational Technical Center is responsible to the director
22 and performs, in general, the same kind of duties shown
23 above for the Missoula Center position. In addition, she
24 assigns work to five clerical personnel. She does not sit
25 in on the interviews for hiring clerical personnel to whom
26 she assigns work, she does not evaluate their performance or
27 have more than a recommendation regarding their leaves. The
28 job description shows that she serves as lead secretary and
29 coordinates clerical activities for the center. She has
30 access to confidential information related to labor rela-
31 tions matters and she deals with personnel matters.

1 3. The Administrative Secretary at the Great Falls
2 Vocational Technical Center reports to the director and
3 performs the same kind of duties as those shown above in
4 Nos. 1 and 2. She assigns work to a group of seven clerical
5 personnel. She spends 25% of her time coordinating clerical
6 activities and the rest of her time performing other duties.
7 She does not evaluate the performance of clerical personnel
8 and she receives assistance from the business manager if she
9 has problems with them. The job description for her posi-
10 tion shows she helps coordinate the activities of other
11 secretaries beyond their regular assigned tasks. She has
12 access to confidential information related to labor rela-
13 tions matters and she deals with personnel matters.

14 4. The Administrative Assistant at the Helena Voca-
15 tional Technical Center spends about 25% of her time doing
16 the clerical-type work shown above. She spends considerable
17 time doing work involving the coordination and direction of
18 an eight-member office clerical staff. In addition to
19 assigning them work she reprimands them when necessary,
20 authorizes their leave, serves on an interview committee
21 which makes a recommendation regarding their hiring and
22 evaluates their performance. She has access to confidential
23 information related to labor relations and she is involved
24 in personnel matters.

25 5. An Administrative Secretary/Assistant position
26 responsible to the director of the Butte Vocational Techni-
27 cal Center does not exist now. However, the Board of
28 Regents plans to create and fill such position when govern-
29 ance switches on July 1, 1989.

30 6. There is no evidence from which to conclude that
31 any of the five vocational technical center directors
32 formulate, determine, and effectuate labor relations policy

1 now. However, the Commissioner of Higher Education plans to
2 have them work with personnel in his office to formulate
3 policies and procedures related to labor relations matters
4 and to be a part of the negotiations process. There will be
5 at least one of them on management's bargaining team along
6 with a business manager from one of the centers.

7 The Five Fiscal Officer Positions

8 1. Four of the fiscal officer/business manager
9 positions report directly to their center director and
10 perform duties related to the planning, coordinating and
11 directing of the financial and nonacademic business at the
12 center. They assign work to subordinate supervisory person-
13 nel, evaluate their performance, make recommendations on
14 hiring and fill in for the director in his absence.

15 2. A fiscal officer position responsible to the
16 center director in Butte does not presently exist, however,
17 the Board of Regents plans to create and fill such position
18 when it assumes control. That position along with the other
19 four comparable positions in the other centers will be
20 responsible for all accounting, budgeting and financial
21 reporting and will supervise the operation of the physical
22 plant program.

23 The Head Bookkeeper Position

24 1. The head bookkeeper at the Missoula Vocational
25 Technical Center reports to the chief fiscal officer and is
26 responsible for the general ledger accounting system and
27 financial records. She assigns work to two bookkeepers and
28 spends 75% of her time doing bookkeeping work. She goes to
29 the chief fiscal officer if she has problems regarding her
30 responsibilities.

1 The Chief Engineer/Head Custodian Positions

2 1. The chief engineer at the Missoula Vocational
3 Technical Center reports to the chief fiscal officer. He
4 only becomes involved personally in extraordinary mainte-
5 nance work. His primary responsibility is to direct six
6 custodians. He also directs work-study students. He sits
7 on the interview team for hiring and he approves overtime
8 and leave.

9 2. The head custodian at the Billings Vocational
10 Technical Center assigns work to two regular custodians and
11 four work-study students who work two to three hours per
12 day. He assigns work areas and shifts, approves time off
13 and prioritizes work. He reports directly to the center
14 director.

15 The Parts Positions

16 1. There is no evidence on the record to support a
17 conclusion that the two parts handlers at the Helena Voca-
18 tional Technical Center should be included or excluded from
19 any bargaining unit.

20 DISCUSSION

21 Section 39-31-202 MCA directs the Board of Personnel
22 Appeals to consider certain factors in determining whether
23 employees have a sufficient community of interest with other
24 employees to be placed in the same bargaining unit. In
25 addition to community of interest, other factors such as
26 wages, hours, fringe benefits, working conditions, history
27 of bargaining, supervision, common personnel policies,
28 integration of work functions, interchange among the employ-
29 ees and the desire of the employees are to be considered.

30 An examination of the factors compel the conclusion
31 that clerical employees should not be included in a bargain-
32 ing unit with custodial employees. They do not have a

1 community of interest. Their wages, hours, working condi-
2 tions, and supervision are different. There is no integra-
3 tion of their work functions nor is there an interchange
4 among the employees. The Board of Personnel Appeals has
5 never certified a bargaining unit of clericals and custodi-
6 ans where the matter was contested and went to hearing.

7 In 1979 the Collective Bargaining for Public Employees
8 Act was amended to exclude confidential employees from its
9 coverage. Section 39-31-103(12) MCA reads:

10 (12) "confidential employee" means any person
11 found by the Board to be a confidential labor
12 relations employee ...

13 The Board of Personnel Appeals has relied on the
14 National Labor Relations Board and federal court precedence
15 for guidance in arriving at its interpretation of what
16 constitutes a confidential employee. Although the National
17 Labor Relations Act does not exclude confidential employees,
18 the National Labor Relations Board has a long established
19 policy, as expressed in its decisions, of excluding such
20 personnel from coverage.

21 Early on the National Labor Relations Board in Ford
22 Motor Company, 66 NLRB 1317, 17 LRRM 394 (1946), decided
23 that those employees who assist and act in a confidential
24 capacity to persons who exercise managerial functions in the
25 field of labor relations should not be in a bargaining unit
26 of rank and file workers. Managerial employees the NLRB
27 held were..."employees who are in a position to formulate,
28 determine and effectuate management policies. These employ-
29 ees we have considered and still deem to be 'managerial' in
30 that they express and make operative decisions of manage-
31 ment."

32 In B.F. Goodrich Company, 115 NLRB 722, 37 LRRM 1383
(1956) the NLRB found that the definition of 'confidential

1 employee' used in the Ford case should be strictly followed.
2 It went on to exclude as confidential only those employees
3 who assist and act in a confidential capacity to persons who
4 formulate, determine and effectuate management policies in
5 the field of labor relations. Specifically, the NLRB
6 excluded as confidential the secretary to a personnel
7 director and an office manager because they were involved in
8 labor negotiations.

9 More recently, and directly on point her, the National
10 Labor Relations Board, in Siemens Corp., 224 NLRB 216, 92
11 LRRM 1445 (1976), felt that the secretary to a district
12 manager, who was a member of the employer's bargaining team,
13 was a confidential employee because she acted in such
14 capacity to a person who was involved in formulating,
15 determining and effectuating the employer's labor relations
16 policies.

17 The U.S. Supreme Court in a 1981 case reviewed the
18 National Labor Relations Board's policy regarding the
19 exclusion of confidential employees from bargaining units of
20 regular employees and held that the long-standing practice
21 of excluding only those confidential employees who satisfied
22 the Board's labor-nexus test has a reasonable basis in law.
23 NLRB vs. Hendricks County Rural Electric Membership Corp.,
24 354 U.S. 170, 108 LRRM 3105 (1981), Rev'g. 67 F.2d 766, 104
25 LRRM 3158 (C.A. 7). The Court cited B.F. Goodrich Company,
26 *supra*, and stated that the Board had consistently applied
27 the labor-nexus test by excluding from the bargaining unit
28 those employees who assist and act in a confidential capaci-
29 ty to persons who formulate, determine and effectuate
30 management policies in the field of labor relations, and
31 those who regularly have access to confidential information
32 concerning anticipated changes which may result from

1 collective bargaining. The fact that employees have access
2 to confidential information of a business nature will not
3 serve to exclude them from a bargaining unit so long as the
4 information does not relate to labor relations matters.

5 Minneapolis - Moline Company. 24 LRRM 1443 (1949).

6 The evidence in the instant case shows that the five
7 vocational technical center directors will be in a position
8 to formulate, determine, and effectuate labor relations
9 policies for the employer next year when the Board of
10 Regents takes over. Therefore, their secretaries will be
11 confidential as that term is used in labor law. Although
12 the Board of Personnel Appeals has not in the past consid-
13 ered prospective duties and responsibilities of positions
14 when determining bargaining unit coverage, this case is
15 unique. The legislature directed the Board of Personnel
16 Appeals to determine the appropriate bargaining unit or
17 units for the purposes of bargaining for contracts to be
18 negotiated with the Board of Regents prior to July 1, 1989.
19 The Board of Regents, however, does not become the employer
20 until July 1, 1989. For that reason it is appropriate to
21 consider the duties of the affected positions as they are
22 likely to exist when the Board of Regents takes over. The
23 Commissioner of Higher Education and the Deputy Commissioner
24 for Management and Fiscal Affairs testified about the future
25 duties of the center directors. They both clearly indicated
26 that all five would be significantly involved in
27 formulating, determining, and effectuating labor relations
28 policy next year. The five secretaries/administrative
29 assistants to the center directors will regularly have
30 access to confidential labor relations information concern-
31 ing anticipated changes resulting from collective
32

1 bargaining. They should, therefore, be excluded from the
2 bargaining unit.

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

8 ...Any individual having authority in the interest
9 of the employer to hire, transfer, suspend, lay
10 off, recall, promote, discharge, assign, reward,
11 discipline other employees, having responsibility
12 to direct them, to adjust their grievances, or
13 effectively recommend such actions, if in connec-
14 tion with the foregoing the exercise of such
15 authority is not of a merely routine or clerical
16 nature but requires the use of independent judg-
17 ment.

18 The word "supervisor" is defined in Section 2(11) of
19 the National Labor Relations Act and is essentially identi-
20 cal to the wording in Section 39-31-103(3) MCA.

21 The National Labor Relations Board has long held that,
22 because the enumerated personnel actions contained in the
23 statute are listed in the disjunctive, possession of any one
24 of them is sufficient to make an employee a supervisor.
25 NLRB vs. Broyhill Co., 514 F.2d 655, 89 LRRM 2203 (C.A. 8);
26 NLRB vs. Metropolitan Life Insurance Co., 405 F.2d 1169, 70
27 LRRM 2029 (C.A. 2, 1968).

28 The National Labor Relations Board does, however,
29 distinguish between true supervisors and straw bosses, lead
30 workers and other minor supervisory employees. NLRB vs.
31 Security Guard Service Inc., 384 F.2d 143, 66 LRRM 2247 (5th
32 C.A., 1967). The status of supervisory employee is not to
be construed so broadly that persons are denied employee
rights which the statute was designed to protect. NLRB vs.
Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974);
Westinghouse Electric Corp. vs. NLRB, 424 F.2d 1151, 74 LRRM

1 2070 (7th C.A., 1970), cert. denied 400 U.S. 831, 75 LRRM
2 2379 (1970).

3 Certain well-established principals have been developed
4 in the federal sector for determining who is supervisory
5 employees under the National Labor Relations Act. In
6 Security Garbage Service, supra, the court held that to be a
7 supervisor, an employee must have authority to use indepen-
8 dent judgment in performing supervisory functions in the
9 interest of management.

10 An employee is not a supervisor when he has the power
11 to exercise or effectively recommend the exercise of one of
12 the functions unless such power is accompanied by authority
13 to use independent judgment in determining how, in the
14 interest of management, it will be exercised. Authority to
15 perform one of the functions is not supervisory if the
16 responsibility is routine and clerical. NLRB vs. Wentworth
17 Institute, 515 F.2d 550, 89 LRRM 2033 (1st C.A., 1975); NLRB
18 vs. Metropolitan Petroleum Co., 506 F.2d 616, 87 LRRM 3139
19 (1st C.A., 1974).

20 For supervisory status to exist, the position must
21 substantially identify the employee with management. NLRB
22 vs. Doctors' Hospital of Modesto, Inc., 489 F.2d 772, 85
23 LRRM 2228 (9th C.A., 1973). An employee may have potential
24 powers, but theoretical or paper power will not make a
25 supervisor. Tables of organization and job descriptions do
26 not vest power. Some kinship to management, some emphatic
27 relationship between employer and employee must exist before
28 the employee becomes a supervisor for the employer. NLRB
29 vs. Griggs Equipment, Inc., 307 F.2d 275, 51 LRRM 2020 (5th
30 C.A., 1962).

31 The degrees of authority to direct the work of others
32 varies from that of a general manager or other top executive

1 to lead workers. The gradations are so infinite and subtle
2 that the federal courts have given the National Labor
3 Relations Board a large measure of informed discretion in
4 exercising its responsibilities to determine who is a
5 supervisor. NLRB vs. Swift and Co., 292 F.2d 561, 48 LRRM
6 2695 (1st C.A., 1961).

7 When an employee merely acts as the conduit for orders
8 taken which emanate from superiors he is performing routine
9 tasks. Screwmatic, Inc., 218 NLRB No. 210, 89 LRRM 1508
10 (1975). The title carried by a position has little bearing
11 on whether it is supervisory. It is the function rather
12 than the label that is significant. Bell Aerospace, supra;
13 Phillips vs. Kennedy, 542 F.2d 5293 LRRM 2353 (8th C.A.,
14 1976).

15 Directing and assigning work by a skilled employee to
16 less skilled employees do not involve the use of independent
17 judgment when it is incidental to the application of the
18 skilled employees technical or professional knowledge. In
19 such a situation the skilled employee does not exercise
20 independent judgment as a representative of management
21 within the meaning of the statutory requirement. Westing-
22 house Electric, supra; Arizona Public Service Co. vs. NLRB,
23 453 F.2d 228, 79 LRRM 2099 (9th C.A., 1971).

24 The Iowa Public Employee Relations Board defines an
25 effective recommendation as one which, under normal circum-
26 stances and policy, is made at the chief executive level or
27 below and is adopted by higher authority without independent
28 review or de novo consideration as a matter of course. In
29 City of Davenport vs. PERB, 264 N.W.2d 307, 98 LRRM 2582
30 (1970), the Iowa Supreme Court endorsed the Board's defini-
31 tion and noted that a mere showing that recommendations are
32 followed does not make them "effective" within the meaning

1 of the Iowa statutes. The City of Davenport case was cited
2 and its principals were adopted by this Board in Department
3 of Administration vs. MPEA, U.C. 6-80.

4 Assigning employees to work on a routine basis is
5 insufficient reason to create supervisory status because it
6 does not require the use of independent judgment. NLRB vs.
7 McQuaide, Inc., 552 F.2d 592, 94 LRRM 2950 (3rd C.A., 1977);
8 Harmon Industries, supra.

9 One must look behind the appearance of certain said to
10 exist authority in order to determine whether alleged
11 supervisory personnel actually exercise substantial discre-
12 tion with respect to those statutory criteria or whether
13 they merely make routine, broadly agreeable decisions.
14 Central Buying Service, 223 NLRB 77 (1976), 92 LRRM 1145;
15 Mountain Manor Nursing Home, 204 NLRB 425 (1973), 83 LRRM
16 1337; Harlem Rivers Consumer Cooperative, Inc., 191 NLRB 314
17 (1971), 77 LRRM 1883; Commercial Fleet Washington, Inc., 190
18 NLRB 326 (1971), 77 LRRM 1156. When an employee's exercise
19 of authority is routine in nature, i.e. it follows estab-
20 lished procedures, the position should not be excluded from
21 the bargaining unit. Enco Steel, Inc., 227 NLRB 148 (1977),
22 94 LRRM 1747; Pinecrest Convalescent Home, Inc., 222 NLRB 10
23 (1976).

24 The following considerations for determining superviso-
25 ry status were recommended by a hearing examiner and later
26 adopted by this Board in Billings Firefighters Local No. 521
27 vs. City of Billings, U.C.1-77:

28 Whether the employee has independent authori-
29 ty to perform the function enumerated in the Act.

30 Whether the exercise of authority in the area
of assignment and direction is routine.

31 Whether the employee uses independent judg-
32 ment in directing the activities of others.

1 Whether the recommendations made by the
2 employee are subject to independent review or
3 investigation.

4 Whether a substantial amount of the employ-
5 ee's time is spent doing work which is similar to
6 his subordinates.

7 Whether an unrealistic and excessively high
8 ratio of supervisors to employees would be cre-
9 ated. (Citations omitted.)

10 An application of the principals ascertained from the
11 above cases to the facts derived from the record in the
12 instant case compels the conclusion that, except for the
13 chief fiscal officer-type positions at the centers, none of
14 the positions in dispute is a true supervisor. It is hard
15 to imagine that the directors, the chief executives of the
16 centers, adopt recommendations made by the head engineers/-
17 custodian, the chief bookkeeper or the secretary/administra-
18 tive assistant without independent review or de novo consid-
19 eration as a matter of course. They are lead workers. The
20 nature of their work compared to that of the chief fiscal
21 officers, does not substantially identify them with manage-
22 ment. They do not have authority to use independent judg-
23 ment to determine how, in the interest of management, their
24 alleged supervisory powers will be exercised. Their author-
25 ity and responsibility are routine and are clerical in
26 nature.

27 Completion of analysis requires an examination of the
28 question whether any of the employees as alleged by the
29 Board of Regents are management officials pursuant to
30 Section 39-31-103(4) MCA, where the term is defined as "a
31 representative of management having authority to act for the
32 agency on any matters related to the implementation of
agency policy." Although the National Labor Relations Act
does not exclude management officials, the National Labor
Relations Board has for many years excluded them from

1 bargaining units. The U.S. Supreme Court said, in Bell
2 Aerospace Company, supra, that managerial employees were not
3 covered by the act. The Court went on to approve the
4 "exclusion of such employees based on a determination of
5 whether they formulate, determine and effectuate an employ-
6 er's policies, if they use discretion in performing their
7 jobs and are not required to exercise that discretion in
8 conformity with the employer's established policy." In
9 General Dynamics Corp. Convair Aerospace Division, 213 NLRB
10 124, 87 LRRM 1705 (1974), the National Labor Relations Board
11 reviewed the alleged managerial status of employees in the
12 aerospace industry and concluded that:

13 ...Managerial status is not conferred upon rank
14 and file workers or upon those who perform
15 routinely, but rather it is reserved for those in
16 executive-type positions, those who are closely
17 aligned with management as true representatives of
18 management. Work which is based on professional
19 competence necessarily involves a consistent
20 exercise of discretion and judgment, else profes-
21 sionalism would not be involved. Nevertheless,
22 professional employees plainly are not the same as
23 the management employees either by definition or
24 in authority, and managerial authority is not
25 vested in professional employees merely by virtue
26 of their professional status or because work
27 performed in that status may have a bearing on
28 company direction. Likewise, technical expertise
29 in administrative functions which may involve the
30 exercise of judgment and discretion does not
31 confer executive-type status upon the performer

32 ...

33 An application of the above principals to the facts
34 relevant to the duties and responsibilities of the employees
35 who occupy positions in controversy here forces the conclu-
36 sion that none has managerial status. They do not have
37 authority to formulate, to determine or effectuate manage-
38 ment policies by the use of discretion. Such authority
39 rests with the center directors and others above them.

31 CONCLUSIONS OF LAW

32 1. The 1987 Legislature enacted a law that placed
governance of the five state vocational technical centers

1 under the authority of the Board of Regents of the Montana
2 University system. The pertinent part of that law reads:

3 ... (2) A person employed by a center under a
4 school district on June 30, 1989 becomes an
employee of the Board of Regents on July 1, 1989.

5 (3) Following July 1, 1987, the employees of any
6 center or the Board of Regents may apply to the
7 Board of Personnel Appeals for determination of
8 the appropriate bargaining unit or units for the
9 purposes of collective bargaining for a contract
or contracts to be negotiated with the Board of
Regents prior to July 1, 1989. (Section 20-16-107
MCA)

10 2. Pursuant to Section 39-31-202 MCA the units
11 appropriate for the purpose of collective bargaining for the
12 classified employees of the five vocational technical
13 centers are: (1) one unit of all custodial, maintenance
14 and food service employees and (2) one unit of all secre-
15 tarial and clerical employees.

16 All other employees including confidential employees,
17 supervisory, and managerial employees are excluded from the
18 units.

19 3. All five of the administrative secretaries/-
20 assistants are confidential, pursuant to Section
21 39-31-103(12) MCA. They are not supervisors pursuant to
22 Section 39-31-103(3) MCA.

23 4. The fiscal officer/business manager positions at
24 the centers are supervisory positions pursuant to Section
25 39-31-103(3) MCA.

26 5. The head bookkeeper position at the Missoula
27 Vocational Technical Center is neither supervisory, confi-
28 dential, nor managerial, pursuant to Section 39-31-103(3),
29 (4) and (12) MCA.

30 6. The [chief engineer position at the Missoula
31 Vocational Technical Center] and the head custodial position
32 at the Billings Center are not supervisory pursuant to

1 Section 39-31-103(3) MCA. They are not managerial pursuant
2 to Section 39-31-103(4) MCA.

3 RECOMMENDED ORDER

4 A secret ballot election pursuant to Section 39-31-208
5 MCA among those employees in each of the two appropriate
6 units is hereby directed.

7 NOTICE

8 Exceptions to these Findings of Facts, Conclusions of
9 Law and Recommended Order may be filed within twenty (20)
10 days of service. If exceptions are not filed this recom-
11 mended order will become the order of the Board of Personnel
12 Appeals.

13 Dated this 4th day of May, 1988.

14 BOARD OF PERSONNEL APPEALS

15
16 By: Jack H. Calhoun

17 Jack H. Calhoun
18 Hearing Examiner
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CERTIFICATE OF MAILING

I, Tara Christensen, do hereby certify that a true and correct copy of this document was mailed to the following on the 4th day of May, 1988.

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