

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 3-87

INTERNATIONAL BROTHERHOOD OF )	
TEAMSTERS, CHAUFFEURS, )	
WAREHOUSEMEN OF AMERICA, )	
LOCAL NO 2, )	
	FINDINGS OF FACT,
Petitioner, )	CONCLUSIONS OF LAW
	AND RECOMMENDED ORDER
vs. )	
CITY OF HAMILTON, HAMILTON )	
POLICE DEPARTMENT )	
Respondent. )	

\* \* \* \* \*

On February 19, 1987 the Board of Personnel Appeals received a Petition For New Unit Determination and Election from International Brotherhood of Teamsters, Chauffeurs, Warehousemen of America, Local No. 2 proposing a new unit comprised of police department employees employed as lieutenant, sergeant, patrolmen (police officers) and clerk/typist, excluding the chief of police and assistant chief of police.

On February 27, 1987 a counter-petition was filed by the City of Hamilton proposing a unit consisting of all patrol officers excluding the lieutenant, clerk/typist and probationary employee.

A hearing on the makeup of the unit was held on April 14, 1987 under the authority granted to the Board by 39-31-207 MCA and 39-31-202 MCA. The petitioner was represented by Al Longoria. The employer was represented by D.W. McKenna, city attorney. The hearing was conducted by John Andrew.

II. ISSUES

As defined in the pre-hearing and as stipulated at the time of hearing the issues were as follows:

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1. Whether the clerk/typist enjoyed a community of interest with other members of the proposed unit; and whether the clerk/typist constituted a confidential employee as defined in the Act;

2. Whether the probationary employee enjoyed a community of interest with other members of the proposed unit; and whether he had standing to be in the proposed unit;

3. Whether the position of lieutenant constituted a supervisory employee as defined in the Act.

III. FINDINGS OF FACT

Based on testimony and evidence adduced I find as follows:

THE LIEUTENANT POSITION

1. The City of Hamilton Police Department consists of nine sworn officers including a chief of police, assistant chief of police, a lieutenant, a sergeant, four patrol officers, and one probationary officer.

2. As a result of a job related injury the present lieutenant is not actively employed by the City of Hamilton. His position has not been filled even on an interim basis.

3. The lieutenant's position has not been involved in hiring decisions, firing decisions, promotions, establishing of pay rate, grievance resolution, evaluation, promotion transfer or even job assignment. In fact, as the incumbent testified, job assignments are made by the assistant chief of police without prior consultation.

4. The lieutenant's position spends the majority of each shift on patrol.

5. The lieutenant's position has never been involved in budget matters nor has the position ever attended regular

1 city council meetings and/or conferences between city  
2 officials and the chief of police.

3 6. While he was on active duty the incumbent  
4 lieutenant testified that he was in charge of the 2:00 p.m.  
5 to midnight shift four days of the week.

6 7. The lieutenant's position was in existence at the  
7 time the petition for unit determination was filed.

8 PROBATIONARY EMPLOYEE

9 1. The probationary officer performs the same duties  
10 as his fellow patrol officers.

11 2. The probationary officer is supervised by the same  
12 individuals as are his fellow patrol officers. He is  
13 governed by the same policies and procedures as are his  
14 fellow officers.

15 3. The probationary employee position existed at the  
16 time the petition for a new unit was filed.

17 4. But for the requirement in state statute that a  
18 new officer be in a probationary status for a one year  
19 period the probationary position does not differ to any  
20 appreciable extent from that of the other patrol officers.

21 CLERK/TYPIST

22 1. It was the City of Hamilton's contention that the  
23 duties of the clerk/typist would be changing in the future  
24 and/or that the position would be eliminated because of  
25 budgetary considerations. At present the duties are sub-  
26 stantially similar to those contained in the position  
27 description, (Petitioner's Exhibit No. 1).

28 3. The clerk/typist is supervised by the chief of  
29 police as are the other patrol officers.

30 4. The clerk/typist dispatches patrol officers.

31 5. The clerk/typist meets in regular staff meetings  
32 with the other patrol officers.

1           6.    The clerk/typist is on the payroll of the City of  
2 Hamilton as are the patrol officers.

3           7.    Historically the position has been considered as a  
4 part of the police unit. The combining of city law enforce-  
5 ment functions with county law enforcement has resulted in a  
6 change of some of the position's duties. (see Employer's  
7 Exhibit #3) It may result in more changes in the future.  
8 In fact, the position may even be eliminated. At present  
9 the position still works closely with the unit.

10          8.    The clerk/typist position does not attend person-  
11 nel meetings or negotiating sessions with the chief of  
12 police. At best the position may type some correspondence  
13 dealing with employee evaluation, however, at present and as  
14 seen through the testimony of the chief of police, the  
15 incumbent has never been involved in any activity that could  
16 be considered of a confidential nature.

17 IV.   DISCUSSION

18 PROBATIONARY EMPLOYEE

19           In determining the makeup of a bargaining unit several  
20 factors must be considered including community of interest,  
21 wages, hours, fringe benefits, and other working conditions  
22 of the employees involved, common supervision, common  
23 personnel policies, extent of integration of work functions  
24 and interchange among employees affected, and the desires of  
25 the employees - 39-31-203 MCA. But for the fact that he is  
26 probationary as per 7-32-4113 MCA the City of Hamilton  
27 presented not one iota of evidence to distinguish the  
28 probationary employee from his fellow officers.

29           The City of Hamilton is concerned that the probationary  
30 employee, because he does not enjoy permanent status, may  
31 not be around to participate in the unit when and if it is  
32 created. Thus the City feels he should not vote on the unit

1 nor be in the unit if it is created. This rationale carries  
2 no weight.

3 First of all, the probationary employee is affected by  
4 the creation of the unit and should have a say in the  
5 voting.

6 Secondly, the probationary employee, but for the one  
7 year statutory distinction, is doing the same work as his  
8 peers and thus should not be treated disparately when it  
9 comes to voting or being in the unit if it is created.

10 Thirdly, and perhaps most important, is the basic flaw  
11 in the City's logic that the probationary officer may not be  
12 around if he does not complete the probationary period. If  
13 this reasoning is carried to a logical conclusion there  
14 would be no bargaining units as there is no guarantee that  
15 any employee will always remain in any given unit.

16 For the above reasons and further based on precedent of  
17 the Board as expressed in DC #6-78 and UD #26-79 the positon  
18 of probationary employee should be included in the proposed  
19 unit.

20 CLERK/TYPIST

21 As with the probationary employee the City of Hamilton  
22 contended that the clerk/typist position should not be in  
23 the unit as its future is uncertain. The same rationale  
24 used in determining that the probationary employee should be  
25 in the proposed unit also applies to the clerk/typist  
26 position. One must look to what is currently in existence  
27 and to what was in existence at the time the petition was  
28 filed (24.26.658 ARM) rather than to what might exist at  
29 some unknown time in the future. Nothing in 39-31-101 MCA  
30 et seq. contemplates excluding an employee from a proposed  
31 unit based on what might happen in the future. If a unit is  
32 recognized, and if changes do occur, there are unit  
clarification procedures to address the problem.

1 The clerk/typist position shares a community of inter-  
2 est with the other officers and meets the other criteria  
3 embodied in 39-31-202 MCA. The position should be in the  
4 proposed unit.

5 THE LIEUTENANT

6 The thrust of the City's position regarding the lieu-  
7 tenant is that the position is supervisory as defined in  
8 39-31-103 (3) MCA. In the Act a supervisor is defined as  
9 "any individual having authority in the interest of the  
10 employer to hire, transfer, suspend lay off, recall,  
11 promote, discharge, assign, reward, discipline other  
12 employees, having responsibility to direct them, to adjust  
13 their grievances, or effectively to recommend such action,  
14 if in connection with the foregoing the exercise of such  
15 authority is not of a routine or merely clerical nature but  
16 requires the exercise of independent judgment."

17 For a person to be exempt as a supervisor, that  
18 individual need only possess one of the enumerated powers,  
19 (NLRB v. Metropolitan Life Insurance Co., 405 F.2d 1169, 70  
20 LRRM 2029) However, this is true provided that the  
21 position actually exercises independent judgment.<sup>1</sup> In the  
22 case of the City of Hamilton several things are apparent.

23 The lieutenant has never hired, fired, demoted  
24 suspended, or exercised any of the other powers enumerated  
25 in 39-31-103(3). All such powers rest with the chief of  
26 police and/or city council/mayor.

27  
28 <sup>1</sup>For typical NLRB decisions see: Central Buying  
29 Service, 223 NLRB 77, 92 LRRM 1145 (1976); Pinecrest  
30 Convalescent Home, 222 NLRB 10, 91 LRRM 1082; Mountain Maner  
31 Nursing Home, 204 NLRB 425, 83 LRRM 1337 (1973); Leisure  
32 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., 1919 NLRB 314, 77  
LRRM 1888 (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 The lieutenant position has never had any meaningful  
2 input into any of these major areas nor has he attended any  
3 meetings pertaining to personnel matters.

4 If the position enjoyed a meaningful supervisory role  
5 it would not seem reasonable that it remains unfilled.

6 The ratio of supervisors to employees is inordinately  
7 high. If the lieutenant position were also supervisory  
8 there would be three supervisors to six employees. The  
9 NLRB, whose precedent is also precedent for the Board of  
10 Personnel Appeals, ULP 37-81, and Billings School District  
11 No. 2 v. Board of Personnel Appeals, 604 P.2d 770, (Mont.  
12 1979), has recognized such ratios as improper. ( See for  
13 example, Commercial Fleet Wash, Inc., 77 LRRM 1156, and  
14 Central Buying Service, 223 NLRB 77 )

15 For the above reasons the position of lieutenant should  
16 be included in the proposed unit.

#### 17 V. CONCLUSIONS OF LAW

18 1. The position of clerk/typist is not confidential  
19 as defined in 39-31-103 (12) MCA.

20 2. The position of lieutenant is not supervisory as  
21 defined in 39-31-103 (3) MCA.

22 3. The position of probationary employee is approp-  
23 riate to the unit as defined in 39-31-202 MCA

#### 24 VI. RECOMMENDED ORDER

25 It is recommended that the appropriate unit for  
26 purposes of collective bargaining in the City of Hamilton  
27 Police Department and for purposes of election be all patrol  
28 officers including lieutenant, clerk/typist, and  
29 probationary employee excluding chief of police and  
30 assistant chief of police. It is further recommended that  
31 this matter be scheduled for election at the earliest  
32 convenient date.

VII. NOTICE

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

DATED this 23rd day of April, 1987

By John Andrew  
John Andrew  
Hearing Examiner

\* \* \* \* \*

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 23rd day of April, 1987, postage paid and addressed as follows:

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