

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION: 6-88

MONTANA FEDERATION OF)	
STATE EMPLOYEES,)	
Petitioner,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	RECOMMENDED ORDER
vs.)	
)	
MONTANA DEVELOPMENTAL CENTER,)	
STATE OF MONTANA)	
Employer.)	

* * * * *

I. INTRODUCTION

A hearing on the above matter was held on June 13 and June 14, 1988, in Boulder, Montana, before John Andrew.

The Montana Federation of State Employees was represented by Mike Dahlem and Dan Evans. The State of Montana, Montana Developmental Center, was represented by Tom Gooch.

In the unit determination petition of April 4, 1988, the Montana Federation of State Employees proposed a bargaining unit comprised of Medical Records Supervisor, Custodial Superintendent, Medical Records Clerk, Psychologist II, QMRP, Administrative Assistant II, Secretary II, Typist II, Administrative Secretary I, Personnel Technician, PT/OT Supervisor, Habilitation Relief Supervisor, Cottage Supervisor, Training Officer, and Staff Development Specialist.

1 In the counter petition filed by the State on April 18,
2 1988, the State proposed two units. The first unit was
3 described as:

4 All professional employees of the Montana Developmental
5 Center not otherwise excluded by way of occupying
6 managerial, supervisory, or confidential positions, and
7 employees covered by other collective bargaining
8 agreements.

9 The second unit was described as:

10 All clerical/patient care employees of the Montana
11 Development Center not otherwise excluded by occupying
12 managerial, supervisory, or confidential positions, and
13 employees covered by other collective bargaining
14 agreements.

15 Briefs were filed subsequent to hearing. The matter
16 was submitted on July 15, 1988.

17 II. ISSUES

18 1. Whether the below listed positions are excluded
19 from the unit because of supervisory status.

20 P.T./O.T. Supervisor

21 Staff Development Specialist II

22 Medical Records Administrator

23 Habilitation Relief Supervisor

24 Cottage Supervisor

25 Custodial Supervisor

1 2. Whether the below listed positions should be
2 excluded as confidential and/or supervisory.

3 Office Supervisor III

4 Administrative Assistant II

5 3. Whether one unit or two units would be appropriate
6 for purposes of collective bargaining.

7 Prior to hearing the State stipulated that the po-
8 sitions not enumerated above and listed in the original
9 petition could be included in the bargaining unit or units.
10 It was further understood that the Administrative Assistant
11 II designation applied to one individual as opposed to the
12 entire class.

13 Testimony and evidence were received on the above
14 issues. The questions of supervisory and/or confidential
15 status will be addressed first. The composition of the
16 unit/units will be addressed second. All testimony, evi-
17 dence and argument being considered the hearing examiner
18 makes the following:

19 III. FINDINGS OF FACTS

20 COTTAGE SUPERVISORS AND

21 HABILITATION RELIEF SUPERVISORS

22 1. The Habilitation Relief Supervisors (HRS) and the
23 Cottage Supervisors (CS) are employed in the Habilitation
24 Department. Their department head is Tim Plaska. The
25 Habilitation Department consist of approximately 230 employ-

1 ees. In the department there are ten cottages and nine
2 CS's. Cottages 50 and 55 are supervised by one CS.

3 2. The CS supervises the positions of Habilitation
4 Aide I, II, III, Laundry Worker I, and Habilitation Training
5 Specialist.

6 3. The HRS's cover those times not covered by the
7 CS's. As such the HRS's supervise the same positions as the
8 CS's. In addition the HRS's also indirectly supervise those
9 positions on the grounds during their shift, e.g. housekeep-
10 ing, engineers and nursing.

11 4. The number of employees supervised by CS's aver-
12 ages between fifteen and twenty four. HRS's might directly
13 and indirectly supervise, depending on the shift, as many as
14 fifty employees. Both CS's and HRS's are responsible for
15 shift scheduling of employees.

16 5. The CS's and HRS's approve time cards.

17 6. Neither CS's nor HRS's receive overtime compen-
18 sation. They receive compensatory time.

19 7. The hiring process at the Montana Developmental
20 Center can be categorized into external hiring and internal
21 hiring. In either instance the personnel office compiles a
22 list of applicants most qualified for the position in
23 question. The CS or HRS could do this ranking on their own,
24 but probably for the sake of convenience they rely on
25 personnel for this function. The applicants are generally

1 reduced to the three most qualified positions. From these
2 finalists either the CS or the HRS interviews the individu-
3 als using tests or questions which they design. The CS or
4 HRS decision as to whom to hire is then relayed to the
5 personnel office. The personnel office then implements the
6 recommendation of the CS or HRS.

7 All HRS's and CS's are authorized to hire employees.
8 In the instance of HRS's the hiring responsibilities have
9 been assumed primarily by one individual. This does not
10 negate the fact that any HRS, should they chose, could do
11 their own hiring.

12 8. Both CS's and HRS's have the ability to suspend or
13 discharge employees. Both actions are subject to review
14 either through the contract grievance route or by adminis-
15 trative review of superiors of the HRS's and CS's. It is
16 apparent from the testimony that Mr. Plaska gives his CS's
17 and HRS's considerable latitude in their suspension and dis-
18 charge responsibility.

19 9. The CS's and HRS's evaluate subordinates.

20 10. The CS's and HRS's assign work, schedule shifts,
21 pull employees and in general perform the functions of
22 supervisor to subordinate. CS and HRS positions oversee the
23 day to day and hour by hour activities of their subordi-
24 nates. Two CS's, who testified, Art Hall and David Bristow,
25

1 estimated that supervision constituted fifty percent of each
2 day.

3 11. CS and HRS positions can recommend promotions and
4 do place letters of warning, reprimand and commendation in
5 employee personnel files.

6 12. The CS and HRS positions constitute the first line
7 of supervision for purposes of the grievance procedure.
8 CS's and HRS's adjust grievances regularly and are involved
9 in the first step of the grievance process.

10 13. Neither the CS nor HRS position has any authority
11 in the lay-off or recall process at the Montana Development
12 Center. This process is controlled by the provisions of the
13 collective bargaining agreement.

14 14. On a weekly basis CS's attend manager meetings.

15 15. CS's and HRS's are responsible for approval of
16 leave. The implementation of a new leave tracking policy
17 does not negate this responsibility from the CS's and HRS's.
18 The Administrative Assistant II position which is now
19 involved in the process is primarily a coordinator, not the
20 person responsible for approval of leave.

21 16. Prior to contract negotiations CS's as part of
22 management's negotiating process submit proposals regarding
23 areas they would like addressed in the collective bargaining
24 process.
25

CUSTODIAL SUPERINTENDENT

1
2 17. The Custodial Superintendent is responsible for
3 and supervises a crew of custodial workers consisting of 22
4 CW III's and CW IV's.

5 18. All of the positions supervised by the Custodial
6 Superintendent belong to the AFSCME bargaining unit.

7 19. The hiring process followed by the Custodial
8 Superintendent is similar if not the same as that used by
9 the CS's and HRS's. A list of qualified applicants is
10 submitted from personnel. From this list the Custodial
11 Superintendent conducts interviews and makes a decision as
12 to whom to hire. That choice is submitted to personnel and
13 provided that there is not some glaring mistake made in the
14 process, that person is hired.

15 20. The Custodial Superintendent does have the author-
16 ity to hire, fire and suspend employees.

17 21. The Custodial Superintendent does adjust griev-
18 ances and is involved in the first step of the grievance
19 process.

20 22. The Custodial Superintendent approves leave
21 requests and time records.

22 23. The Custodial Superintendent directs the day to
23 day, and hour by hour activities of the employees under his
24 supervision.
25

1 24. The Custodial Superintendent approves overtime
2 subject to his budgetary constraints.

3 25. The Custodial Superintendent is part of the
4 progressive discipline process and plays an active role in
5 that process.

6 ADMINISTRATIVE ASSISTANT II

7 AND OFFICE SUPERVISOR III

8 26. For purposes of collective bargaining, Tom Dolan,
9 Personnel Director, sits at the bargaining table as does the
10 superintendent.

11 27. Confidential matters involving collective bargain-
12 ing were previously handled by secretaries assigned to the
13 superintendent. Those secretarial positions are now pro-
14 posed to be part of one of two pools. One pool is to be
15 supervised by the Office Supervisor III. The other is to be
16 supervised by the Administrative Assistant II.

17 28. The Administrative Assistant II position is
18 envisioned as supervising four employees, all clerical.
19 The position is also envisioned as performing staff coor-
20 dination functions. The proposed position description calls
21 for approximately 70% of the Administrative Assistant II's
22 time to be devoted to staffing questions. In reality from
23 Mr. Dolan testimony the staff coordination responsibility
24 may consume even more that seventy percent of the position's
25 duties.

1 29. The Office Supervisor III will supervise 11.4
2 employees. The position will have the authority to hire and
3 fire, assign work, suspend, promote and discharge.

4 30. The Office Supervisor III is attached administra-
5 tively to the Superintendent. Through reorganization it may
6 be attached to Administrative Services. The position will
7 work for Fiscal Services, Administrative Services and the
8 Superintendent.

9 31. If no confidential employee were carved out from
10 either the Administrative Assistant II or Office Supervisor
11 III positions there would be no confidential position
12 available to the superintendent, Mr. Dolan or other person-
13 nel involved in the development formulation and implementa-
14 tion of labor relations policy.

15 MEDICAL RECORDS ADMINISTRATOR

16 32. There are a total of 48 people in the Health and
17 Medical Services department of which Medical Records is a
18 division.

19 33. The hiring process in Medical Records works the
20 same as it does in other departments at the Montana Develop-
21 mental Center.

22 34. The Medical Records Administrator is in charge of
23 a staff consisting of two full-time and one half time
24 Medical Records Clerk II.
25

1 35. Ellen Rae Thiel, the incumbent, completed a
2 position description on November 15, 1985, delineating the
3 duties in her position. She furthermore testified as to
4 those duties and responsibilities. As the position descrip-
5 tion indicates, and as her testimony verifies, Ellen Ray
6 Thiel hires people for the medical records department. She
7 further does evaluations of the employees, assigns them
8 tasks and assures that the policies, procedures and objec-
9 tives she has set are being fulfilled.

10 36. Ms. Thiel has the authority to suspend employees.

11 37. Ms. Thiel spends approximately 50% of her time in
12 direct supervision and review of employee work.

13 38. Ellen Rae Thiel's staff is currently non-union.
14 She is responsible for any first level non-union response to
15 grievances and would be responsible under a union contract
16 if it came to be.

17 STAFF DEVELOPMENT SPECIALIST II

18 39. The Staff Development II position supervises three
19 or four training officers. The position does not directly
20 supervise any clerical employees nor is the Training Officer
21 Supervisor I position presently supervised by the Staff
22 Development Specialist.

23 40. Ernie Roeber has filled the Staff Development
24 Specialist II position on an acting basis since March of
25 1987. Although he has been on staff for some time his first

1 hand knowledge of the position is limited. He has not had
2 an opportunity to hire employees, nor have any disciplinary
3 situations arose during his tenure. Both hiring and disci-
4 plinary actions are within the scope of Mr. Roeber's author-
5 ity.

6 41. The Staff Development Specialist approves sick and
7 annual as well as compensatory time.

8 42. The Staff Development Specialist attends meetings
9 with the Treatment Services Director.

10 43. The Staff Development Specialist performs employee
11 evaluations.

12 44. Staff Development Specialists, including Mr.
13 Rober, attend supervisor meetings.

14 45. Since all of the available positions in the staff
15 development area are Training Officer III's there is no
16 provision for Mr. Rober to promote employees. Under current
17 staffing patterns the opportunity simply is not there.

18 46. Although many Training Officers duties are
19 routine in nature the authority is with the Staff Develop-
20 ment Specialist to supervise their daily activities and
21 manage the functioning of the department.

22 PHYSICAL THERAPY SUPERVISOR

23 47. The Physical Therapy Supervisor is in line below
24 the Director of the Health and Medical Records Department.
25 The present Physical Therapy Supervisor is Sharon Swift.

1 56. The employer points to eligibility for overtime as
2 a difference between the proposed professional and cler-
3 ical/patient care units. This appears to be a major element
4 in the State's position. Other than the fact that the
5 employer choses to call some of these people "professional"
6 and therefore not eligible for overtime there is no convinc-
7 ing evidence that, in fact these people meet the definition
8 for exclusion from overtime as bona fide professional
9 employees.

10 57. There is common supervision of the positions in
11 question.

12 58. There is little if any evidence on the record to
13 show the positions work other than the same or substantially
14 the same hours.

15 59. There is an interchange among the employees in the
16 proposed unit/units. See Exhibits Union#1 and Employer's
17 #'s 4,5,6 and 8.

18 60. None of the employees who testified were opposed
19 to a unit including "professional and "non-professional"
20 employees. In fact, when a preference was requested the
21 preference was for a combined unit.

22 IV. DISCUSSION

23 EXCLUDED POSITIONS

24 Montana's Collective Bargaining Act for Public
25 Employees is substantially modeled after the Labor-

1 Management Relations Act, (LMRA). For that reason the Board
2 of Personnel Appeals (BOPA) has turned to the LMRA and to
3 the National Labor Relations Board (NLRB) for precedent in
4 application of the Montana Act. State Department of High-
5 ways v. Public Employees Craft Council, 529 P.2d 785, (Mont.
6 1974); AFSCME Local 2390 v. City of Billings, 555 P.2d 507,
7 (Mont. 1976); Forsyth School District No. 4 v. Board of
8 Personnel Appeals and Forsyth Education Association, 692
9 P.2d 1261, (Mont. 1985)

10 As defined in the LMRA the term "supervisor" means
11 "any individual having authority, in the interest of the
12 employer, to hire, transfer, suspend, lay off, recall,
13 promote, discharge, assign, reward, or discipline other
14 employees, having responsibility to direct them, or to
15 adjust their grievances, or effectively recommend such
16 action, if in connection with the forgoing the exercise of
17 such authority is not of a merely routine or clerical nature
18 but requires the use of independent judgment". The defini-
19 tion embodied in 39-31-103(3) MCA is essentially the same.
20 The NLRB has consistently held that "the definition of
21 supervisor and the twelve tests applicable to the term are
22 written in the disjunctive. Thus, the possession of any one
23 of the listed powers is sufficient for exclusion. NLRB v.
24 Metropolitan Life Company, 405 F.2d 1169, 1173, 70 LRRM
25

1 2029, and NLRB v. Budd MFG. Co., CA 6, 22 LRRM 2414, 169
2 F.2d 571, cert. den. 1949.

3 In the event that the twelve initial test are not met
4 or in the event that there are borderline questions as to
5 whether the individual is a supervisory employee the NLRB
6 has looked to certain secondary tests such as the employee
7 being designated a supervisor; the fact that he is regarded
8 by himself or others as a supervisor; the exercise of
9 privileges accorded only to supervisors; attendance at
10 instructional sessions or meetings held for supervisory
11 personnel; responsibility for a shift or phases or opera-
12 tion; authority to interpret or transmit employer's in-
13 structions to other employees; responsibility for inspecting
14 the work of others; instruction of other employees; authori-
15 ty to grant or deny leave of absence to others; responsibil-
16 ity for reporting rule infractions; keeping of time records
17 on other employees; receipt of substantially greater pay
18 than other employees, not based solely on skill; and failure
19 to receive overtime.

20 In State government there is perhaps a more defined
21 chain of command in terms of hiring and firing decisions
22 than there is in the private sector. For this reason there
23 are constraints in terms of review that are placed on all of
24 the positions that the employer contends should be excluded
25 from the unit. Hiring and firing practices of supervisors

1 at the Montana Developmental Center are reviewed just as
2 they are for supervisors throughout State government.
3 However, for the positions in question the employer has
4 clearly demonstrated that the positions do hire and fire or
5 at the very least have a significant and substantial in-
6 volvement in hiring and firing decisions. Their involvement
7 is far more than routine or clerical. They do exercise
8 independent judgment.

9 As to the assignment of work, there is no doubt from
10 the testimony that the positions alleged as supervisory do
11 assign work. Much of the testimony points to the fact that
12 at least half of the time is spent by the positions in
13 supervision, i.e. assigning and monitoring work. Moreover,
14 given the size of the overall staff at the Montana Develop-
15 mental Center, there is not an inordinate number of
16 supervisors - a factor considered by the NLRB and BOPA in
17 such cases as Emco Steel, Inc., 94 LRRM 1747, Commercial
18 Fleet Wash, Inc., 77 LRRM 1156; Central Buying Service, 223
19 NLRB 77; and Billings School District No. 2 v. Board of
20 Personnel Appeals, 604 P.2d 770, (Mont. 1979). These po-
21 sitions are supervising meaningful and recognized work
22 units.

23 All of the positions are involved in the processing of
24 grievances and either adjust them directly or perform a
25 function in the grievance procedure.

1 All of the positions can discipline employees, perform
2 evaluations, reward them to the extent possible in State
3 government, and generally direct their activities.

4 In short, with the exception of the Administrative
5 Assistant II position, and other than in the areas of layoff
6 and recall, the employer has demonstrated that the positions
7 it requests to be excluded do meet many of the primary tests
8 set down. The positions also meet a substantial number of
9 the secondary tests.

10 Special note must be made of the Administrative
11 Assistant II position. Given the prospective nature of the
12 position coupled with the employer's own statements that the
13 position may spend seventy percent - perhaps more - of its
14 time in scheduling activities this position cannot be
15 recognized as supervisory.

16 As to the confidential question, the Union agrees that
17 one position, at the least, could be confidential. The
18 Office Supervisor III meets the test. Again, as with the
19 questionable status of the Administrative Assistant II
20 vis-a-vis supervisory exclusion, the position is equally
21 questionable as to confidential status and should not be
22 excluded.

23 UNIT COMPOSITION

24 The employer did not demonstrate any overriding con-
25 cerns that would dictate two units. The presence or absence

1 of overtime is not convincing since both exempt and
2 nonexempt positions can receive compensatory time. The
3 evidence indicates that given the criterion of 39-31-202 MCA
4 one unit would be appropriate. As the Union points out,
5 this is not inconsistent with other units such as that
6 recognized in UD #3-84 where positions such as Editor II,
7 Archivist II and Architectural Historian were combined with
8 Secretary I's, Sales Clerk I's and Tour Guide II's.

9 V. CONCLUSIONS OF LAW

10 The positions of Custodial Superintendent, Physical
11 Therapy Supervisor, Staff Development Specialist II, Medical
12 Records Administrator, Habilitation Relief Supervisor, and
13 Cottage Supervisor are supervisory positions as per
14 39-31-103 (3) MCA and therefore excluded from the unit.

15 The position of Office Supervisor III is confidential
16 as per 39-31-103 (12) MCA and therefore excluded from the
17 unit.

18 One unit is appropriate under 39-31-202 MCA.

19 VI. RECOMMENDED ORDER

20 The bargaining unit for the Montana Developmental
21 Center shall be composed of all Psychologist III, Training
22 Officer II, Mental Health Retardation Specialists (QMRP's),
23 Medical Record Clerk, Secretary II, Typist III, Secretary
24 Admn. I, Personnel Technician I, and Administrative Assis-
25 tant II positions not otherwise excluded by way of occupying

1 managerial, supervisory, or confidential positions, and
2 employees covered by other collective bargaining agreements.

3 It is further ordered that an election by secret ballot
4 shall be conducted as early as possible, in accordance with
5 the rules and regulations of the Board of Personnel Appeals,
6 among the employees in the above described bargaining unit,
7 employed by the Montana Developmental Center on April 4,
8 1988, to determine whether they desire to be represented for
9 collective bargaining purposes.

10 Board of Personnel Appeals
11 By:

12  8/5/88
13 John Andrew
Hearing Examiner

14 NOTICE:

15 Exceptions to these Findings of Facts, Conclusions of
16 Law and Recommended Order may be filed within twenty days of
17 service. If no exceptions are filed the Recommended Order
18 will become the Order of the Board of Personnel Appeal.
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CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 15th day of August, 1988, postage paid and addressed as follows:

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