

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 2-92:

INTERNATIONAL BROTHERHOOD OF )  
ELECTRICAL WORKERS, LOCAL )  
UNION NO. 44, )

Petitioner, )

vs. )

STATE OF MONTANA, DEPARTMENT )  
OF NATURAL RESOURCES AND )  
CONSERVATION, )

Employer. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

Pursuant to a Board of Personnel Appeals Order of April 8, 1992, this matter was remanded to this Hearing Officer to define all the issues, conduct a hearing and issue a decision. Pre-hearings were conducted on May 11 and 26, 1992. At pre-hearing, parties agreed the issues for hearing determination regarding the Unit Determination 2-92 are:

1. whether the Hydroelectric Plant Superintendent (Plant Superintendent) should be excluded from the bargaining unit because the position is supervisory and/or

2. whether the incumbent's certification as an engineer-in-training precludes his inclusion in the unit.

A hearing was conducted in this matter on June 15, 1992. Parties present, duly sworn and offering testimony included Mr. Fred Clark, Business Manager, IBEW Local No. 44, Mike Simms, Hydroelectric Plant Superintendent, Robin Harper, Assistant Administrator, Water Resources Division, Walt Anderson, Section

1 Supervisor, and Paula Stoll, Labor Relations Specialist. Also  
2 present observing the hearing was Jane Benson, Personnel Officer.  
3 Exhibits admitted to the record included all exhibits, motions,  
4 orders, and related correspondence from previous hearing procedures  
5 as well as Employer Exhibits 1 through 5, Union Exhibits 1, 2 and  
6 3, Judicial Notice of Unit Determination No. 11-76 Order and  
7 Opinion (1977) District Judge Gordon Bennett, as well as Title 37,  
8 Chapter 67, MCA and Title 39, Chapter 31, MCA.

9 II. FINDINGS OF FACT

10 1. The Plant Superintendent is the only supervisor regularly  
11 at the work site which is normally just a two man operation. The  
12 work site is a hydroelectric dam located in Toston, Montana. The  
13 Superintendent is responsible for plant operation and production as  
14 well as being a working supervisor. He assigns and appraises work  
15 and corrects work performance problems if occurring. If additional  
16 or temporary help is needed, the Plant Superintendent advises his  
17 supervisor of the need and then participates as an interview team  
18 member. The interview team reaches a collective decision regarding  
19 which applicant should be hired. As immediate supervisor, the  
20 superintendent of positions to be filled is the head of the hiring  
21 team, prepares and asks interview questions and his recommendation  
22 given weight equal to that of other panel members. The  
23 Superintendent does not have authority to independently discharge  
24 staff. He can or would recommend such action if circumstances  
25 warranted such recommendation. The Superintendent, as a working  
26 supervisor, is the only person in the chain of command with the  
27 knowledge and skill to assign, review, work and appraise work  
28 required at the plant.

1           2.     The incumbent Hydroelectric Plant Superintendent holds a  
2 certificate as an "engineer-in-training."     He obtained this  
3 certificate through home study and successful completion of a test  
4 required.     The Petitioner pointed out the Superintendent does not  
5 "practice engineering" as defined in Section 37-67-101(6) and is  
6 not in "responsible charge" as defined in Section 37-67-101(19)  
7 MCA.     The Superintendent indicated that while he does hold a  
8 certificate as an "engineer-in-training" he would be willing to  
9 drop the certification if he could then be a unit member.

10     III. DISCUSSION

11           1.     Section 39-31-103 MCA exempts "supervisory employees"  
12 from the definition of an "employee" covered under the Collective  
13 Bargaining Act for Public Employees.     A "supervisory employee" is  
14 defined:

15                     ...Any employee having authority in the  
16 interest of the employer to hire, transfer,  
17 suspend, layoff, recall, promote, discharge,  
18 assign, reward, discipline other employees,  
19 having responsibility to direct them, to  
20 adjust their grievances, or effectively to  
21 recommend such action, if in connection with  
22 the foregoing the exercise of such authority  
23 is not of a merely routine or clerical nature  
24 but requires the use of independent judgement.

25           Similar language is found in the National Labor Relations Act  
26 at 29 U.S.C. 151 (11).

27           The Montana Supreme Court has approved the practice of the  
28 Board of Personnel Appeals in using Federal Court and National  
Labor Relations Board precedent as guidelines for interpreting the  
Montana Collective Bargaining for Public Employees Act as the State  
Act is similar to the Federal Labor Management Relations Act.  
State ex. rel. Board of Personnel Appeals v. District Court, 183  
Mont. 223 (1977) 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No.

1 45 v. State ex. rel. Board of Personnel Appeals, 195 Mont. 272  
2 (1981), 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young  
3 (III), 683 P.2d 185 (1984), 119 LRRM 2682.

4 The existence or exercise of any one of the authorities  
5 enumerated in the above definition of supervisory employee combined  
6 with the use of independent judgment is sufficient to make a  
7 determination of supervisory status regardless of how seldom the  
8 authority is exercised. George C. Foss Company v. NLRB, 752 F.2d  
9 1407, 118 LRRM 2746, CA 9 (1985). The incumbent Plant  
10 Superintendent has authority to direct, assign, and evaluate  
11 subordinate employees. Such exercise of authority is made at times  
12 with the use of independent judgment. Additionally, the  
13 Superintendent has authority to counsel employees regarding their  
14 work performance and initiate disciplinary procedures as well as  
15 use independent judgment in his recommendations regarding the  
16 choice to employ applicants for vacant positions.

17 The definition of who is a public employee and included within  
18 a collective bargaining unit is governed by Section 39-31-103 (2)  
19 MCA. That section of law excludes from a collective bargaining  
20 unit an "engineer-in-training." Section 37-67-101(3) MCA defines  
21 an "engineer-in-training" as;

22 ...a person who complies with the requirements for  
23 education, experience, and character and has passed an  
24 examination in the fundamental engineering subjects, as  
25 provided in this chapter.

26 The incumbent Superintendent is "an engineer-in-training."  
27 The statute states that a public employee is a person employed by  
28 a public employer except, among other things, engineers in  
training. There are no restrictions or limitations upon the  
definition and the conclusion reached that the language is neither

1 vague nor ambiguous (See Order and Opinion in matter of Unit  
2 Determination 11-76).

3 IV. CONCLUSIONS OF LAW

4 1. The Board of Personnel Appeals has jurisdiction in this  
5 matter pursuant to Section 39-31-202, MCA. Billings, Montana v.  
6 Fire Fighters Local No. 529, 113 LRRM, 3324, 651 P.2d 627, Montana  
7 Supreme Court 1982.

8 2. The Plant Superintendent falls within the definition of  
9 a supervisory employee (Section 39-31-103(3)) MCA as well as an  
10 engineer-in-training as defined in Section 37-67-101(3) MCA and  
11 therefore appropriately excluded from the unit under application of  
12 the Collective Bargaining Act for Public Employees.

13 V. RECOMMENDED ORDER

14 IT IS ORDERED Unit Determination No. 2-92 be dismissed.  
15 DATED this 13 day of August, 1992.

16 BOARD OF PERSONNEL APPEALS

17  
18   
19 JOSEPH V. MARONICK  
Hearing Examiner

20 **SPECIAL NOTICE**

21 In accordance with Board rule ARM 24.25.107(2), the above  
22 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
23 written exceptions are filed within twenty (20) days after service  
24 of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED  
25 ORDER upon the parties.  
26  
27  
28

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Fred A. Clark, Business Manager  
International Brotherhood of Electrical Workers, AFL-CIO  
Local No. 44  
P.O. Box 3467  
Butte, MT 59702-3467

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

Paula Stoll  
Labor Relations Specialist  
State Personnel Division  
Department of Administration  
Room 130 - Mitchell Building  
Helena, MT 59620

DATED this 13<sup>th</sup> day of August, 1992.

Christine S. Roland

SD321.1N

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNIT DETERMINATION NO. 2-92:

INTERNATIONAL BROTHERHOOD OF )  
ELECTRICAL WORKERS, )  
LOCAL UNION NO. 44, )

Petitioner, )

- vs - )

STATE OF MONTANA, )  
DEPARTMENT OF NATURAL RESOURCES )  
AND CONSERVATION, )

Employer. )

ORDER OF REMAND

\* \* \* \* \*

The Findings of Fact; Conclusions of Law; and Recommended Order was issued by Hearing Examiner Joseph V. Maronick on January 10, 1992.

Exceptions were filed to the Findings of Fact; Conclusions of Law; and Recommended Order on January 30, 1992 by Fred A Clark on behalf of the Petitioner.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, February 26, 1992.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED that this case is remanded back to the Hearing Examiner.

2. IT IS ORDERED that the Hearing Examiner is to define all the issues, conduct a hearing and issue a decision.

DATED this 8<sup>th</sup> day of April, 1992.

BOARD OF PERSONNEL APPEALS

BY *Robert A. Poore*  
ROBERT A. POORE  
CHAIRMAN

\* \* \* \* \*

CERTIFICATE OF MAILING

I, *Jennifer Jacobson*, do certify that a true and correct copy of this document was mailed to the following on the 13<sup>th</sup> day of April, 1992:

Fred A. Clark  
Business Manager/Financial Secretary  
International Brotherhood of Electrical  
Workers, Local No. 44  
P.O. Box 3467  
Butte, MT 59702-3467

Paula Stoll  
Labor Relations Bureau  
State Personnel Division  
Department of Administration  
Room 130 - Mitchell Building  
Helena, MT 59620

Brenda Nordlund  
Staff Attorney  
State Personnel Division  
Department of Administration  
Room 130 - Mitchell Building  
Helena, MT 59620

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STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 2-92:

INTERNATIONAL BROTHERHOOD OF )  
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-vs-

STATE OF MONTANA, DEPARTMENT )  
OF NATURAL RESOURCES AND )  
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FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

On August 6, 1991 the International Brotherhood of Electrical Workers, Local Union No. 44 (Petitioner) submitted a petition for new unit determination and election. On August 14, 1991, the Employer counter-petitioned and moved for dismissal. The motion for dismissal was based on the contention that one unit member was statutorily excluded from unit membership because he was an Engineer-in-training and/or a supervisor. With this exclusion, the Employer moved to dismiss the petition because the resulting unit, if one incumbent was statutorily excluded, the result would be a one person unit and therefore not appropriate for collective bargaining purposes.



1 superintendent at the Broadwater Power Project  
2 and exclude all other employees.

3 3. The unit would currently cover two positions:

4 Hydroelectric Plant Superintendent (58400) and  
5 Hydroelectric Plant Operator (58401).

6 4. The work responsibilities of the incumbent superintendent  
7 position includes (from position description attached to Petitioner  
8 Brief):

9 # 6., pg. 1. ...Supervising operation and maintenance  
10 activities and personnel...

11 A., pg. 2. Manages daily plant operations.  
12 (9) (At times)...Hiring, supervision and  
13 scheduling temporary personnel.

14 B., pgs. 2-3. Manage all facility maintenance  
15 activities--scheduled and unscheduled.  
16 (3). ...Assigns maintenance tasks to  
17 subordinates and reviews their work,...

18 (5). Procures...expertise...through temporary  
19 hiring of recognized experts....

20 6. Section 39-31-103, MCA provides:

21 **Definitions.** When used in this chapter, the  
22 following definitions apply:

23 (2)(b) "Public Employee" does not mean: (iii)  
24 a supervisory employee, as defined in  
25 subsection (3) of this section; (xi) an  
26 engineer-in-training.

27 (3) "Supervisory Employee" means any  
28 individual having authority in the  
29 interest of the employer to hire,  
30 transfer, suspend, layoff, recall,  
31 promote, discharge, assign, reward,  
32 discipline other employees, having  
33 responsibility to direct them, to adjust  
34 their grievances, or effectively to  
35 recommend such action, if in connection

1 connection with the foregoing the  
2 exercise of such authority is not of a  
3 merely routine or clerical nature but  
requires the use of independent judgment.

4 III. DISCUSSION

5 The undisputed facts in this matter show the incumbent in  
6 superintendent position 58400 is an "Engineer-in-Training" and is  
7 a "Supervisory Employee." Because the position does not require  
8 licensure as an engineer, the incumbent's training status may not  
9 exclude him. The incumbent's supervisory responsibilities,  
10 however, specifically render him excluded under the act.

11 In Disco Fair Stores, 76 LRRM 1609, 1615, (1971), the NLRB  
12 held that "one-employee bargaining units are not appropriate for  
13 purposes of collective bargaining." With the exclusion of the  
14 supervisory position, a one-employee bargaining unit would result  
15 and therefore the unit would not be appropriate for collective  
16 bargaining.

17 For this reason, the employer's motion to dismiss is properly  
18 offered and granted.

19 IV. RECOMMENDED ORDER

20 It is hereby ordered that Unit Determination No. 2-91 be  
21 dismissed.

22 NOTE

23 In accordance with the Board's rule ARM 24.26.107(2), the  
24 above RECOMMENDED ORDER shall become the FINAL ORDER of this Board

1 unless exceptions are filed within twenty (20) days after service  
2 of these Findings of Fact, Conclusions of Law and Recommended Order  
3 upon the parties.

4 DATED this 10 day of January, 1992.

5 BOARD OF PERSONNEL APPEALS

6  
7 By: Joseph V. Maronick  
8 JOSEPH V. MARONICK  
9 Hearing Examiner

10 CERTIFICATE OF MAILING

11 The undersigned hereby certifies that true and correct copies  
12 of the foregoing documents were, this day served upon the following  
13 parties or such parties' attorneys of record by depositing the same  
14 in the U.S. Mail, postage prepaid, and addressed as follows:

15 Fred A. Clark, Business Manager  
16 IBEW Local No. 44  
17 P.O. Box 3467  
18 Butte, MT 59702

19 The undersigned hereby certifies that true and correct copies  
20 of the foregoing documents were, this day, served upon the  
21 following parties or such parties' attorneys of record by means of  
22 the State of Montana's Deadhead mail service.

23 Paula Stoll  
24 Labor Relations Bureau  
25 Department of Administration  
Room 130 - Mitchell Building  
Helena, MT 59620

DATED this 10<sup>th</sup> day of January, 1992.

Michelle Bailey

SD321.N