

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

IN THE MATTER OF UNIT DETERMINATION NO. 28-95:

TEAMSTERS LOCAL NO. 2,)
)
) Petitioner,)
)
 vs.)
)
 MONTANA FISH, WILDLIFE AND)
 PARKS,)
)
) Employer.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

* * * * *

I. INTRODUCTION:

The petitioner, Teamsters Local #2, filed a petition for unit determination with the Board of Personnel Appeals on March 23, 1995, for certain employees of the employer, Montana Fish Wildlife and Parks. The employer filed a counter petition with the Board on April 26, 1995, which disagreed with the petition contending that some of the employees proposed for unit inclusion were statutorily excluded under "Section 39-31-103 (2) (iii), MCA," (Section 39-31-103 (11), MCA, 1995) as supervisors and the remaining employees, part-time and seasonal, proposed for unit inclusion lacked sufficient community of interest with unit members. Prior to hearing the parties resolved the issue relating to community of interest for certain part-time or seasonal employees. The remaining issue was whether eight employees listed on Joint Exhibit 1, page 1 and 2, identified with an asterisk, are statutorily excluded because of their supervisory responsibilities.

A hearing was conducted on October 2, 1995, before the below signed Hearing Officer. Parties present, duly sworn, and offering

1 testimony included: Union Business Representative, John Manzer;
2 Incumbent Supervisors Maynard LaFond, Doug Frazier and Bruce
3 Brannon; Personnel Director, Doug Denler; Assistant Administrator,
4 Doug Monger; Park Program Manager, Lee Bastian; Supervisor of
5 Accounting and Program Division, Donna Campbell and Supervisor of
6 Design and Construction, Paul Valle. The petitioner was
7 represented by Counsel D. Patrick McKittrick and the employer by
8 Labor Relations Specialist Paula STOL.

9 Documents admitted into the record included employer Exhibits
10 A through E, petitioner Exhibits 1 and 2, and Joint Exhibit 1.
11 Employer exhibits A through E and Petitioner exhibit 2 were
12 admitted over a relevancy objections raised by opposing
13 representatives. Post Hearing Briefs were submitted on October
14 16, 1995.

15 **II. FINDINGS OF FACT:**

16 1. Eight employees (incumbent supervisors) identified with
17 an asterisk on Joint Exhibit #1 are responsible for some
18 supervisory duties which include:

- 19 • equal voting member of three or five member hiring
20 selection committee,
- 21 • daily supervision of two to nine staff,
- 22 • subordinate staff training,
- 23 • grant or denial of leave,
- 24 • review, sign and submit payroll,
- 25 • staff performance appraisal,
- 26 • completion and submission of payroll
27 authorizations,
- 28 • staff assignment on aggregate positions,¹
determination of using few staff many hours or many
staff few hours,

27 ¹An aggregate position is payroll availability for work.
28 e.g. forty hours at grade 8. One person could work a full forty
hours week or five people each one eight hour day or some other
variation equal to forty hour work week.

- determination of use of overtime if available,² and
- maintain supply inventory.

2. Incumbent supervisors work in one of six distinct regions of the State of Montana. They both supervise and perform park maintenance including such activities as road - vehicle - building - maintenance, filling supply requests, traffic counter installation, camping fee accounting, trail grooming, fence building, boat and ramp installation or repair, staff training, observation of contractor work performance, bid solicitation from contractors, planning and assessing new park sites or identifying needed park location repair, preparing maintenance budgets, making recommendations regarding hiring and discharge (Exhibit A 6), prioritizing and assigning work, writing job vacancy announcements, at times drafting interview questions and proposed responses, notifying unsuccessful job applicants, appraising staff work performance, granting or denying leave time and completing payroll time and employment forms.

Uniforms worn by the incumbent supervisors are identical to those of persons they supervise. (Denler hearing, tape 2, foot 22) The supervisors are classified and identified "supervisors" and paid two or three grades above their subordinate staff members.

If an incumbent supervisor was not satisfied with a seasonal or temporary subordinate's work performance and indicated this on the subordinate's performance appraisal which is permanently placed

² When a project might require overtime the incumbent (Exhibit A, 1, 2, and 3) discusses that need with his or her supervisor and, if based upon their request overtime is authorized, the use of the overtime hours is determined by the incumbent supervisor.

1 in the personnel folder, that person would not be later recalled if
2 a subsequent opening occurred for which that person was both
3 qualified and applied for the opening. (Assistant Administrator,
4 Doug Monger HT 2 ft.285)

5 3. Actual hiring authority in state government rests with
6 agency directors. In the Department of Fish, Wildlife, and Parks,
7 the process for hiring involves a committee made up of three
8 members for grade 12 or below, or five members for grades 13 and
9 above. (Denler hearing tape #1, foot 265) The committee is
10 normally made up of the incumbent supervisor, the incumbent's
11 supervisor, and one other staff member. (Personnel person,
12 coworker, etc.) The incumbent supervisor makes up a position
13 announcement which is posted. He or she then regularly drafts
14 application or interview questions and example answers. If work
15 examples are used the incumbent supervisor drafts those examples.

16 Once an application is received each committee member
17 independently rates the application documents. From that rating
18 top candidates are selected for and under go an interview which may
19 or may not include use of questions rated against model answers and
20 a work example test. Thereafter, each panel member individually
21 numerically rates each interviewee. The committee then combines
22 the numerical rating on each applicant's questions, answers,
23 interview and work application, if used, and a top candidate is
24 selected. No panel member's evaluation is given greater weight
25 than any other.

26 4. Individually considered, the record shows the following
27 relating to each incumbent supervisor:

Name	Staff supervised ³	grade	position description PD date	performance appraisal, document exhibit	location region #	supervision examples
Mural Phillips	3	13		Exhibit D 1, 2, and 3	Kalispell #1	Exhibit C 1 and 2, seasonal to full-time payroll authority
Doug Frazier	2 + 1	12	Exhibit A 2 11/19/85	Exhibit D 7 and 8	Missoula #2	Exhibit C 10-13, seasonal staff employment authority
Tom Greason	9	13	Exhibit A 1 8/13/91	Exhibit D 4	Bozeman #3	Exhibit C 2 and 4, new position for permanent status at position
Ray Swartz	3	12	Exhibit A 4 11/18/85	Exhibit D 5	Great Falls #4	Exhibit C 5, and 6 Seasonal authority, "Supervisor will be"
Rick Johnson	3 + 1	12	Exhibit A 5 9/10/82		Billings #5	Exhibit 6, 7 and 8, add Seasonal employee staff report to incumbent. letter
Jerry Dean	2	12	Exhibit A 2 3/30/89		Miles City #7	Exhibit C 9, add seasonal, letter report to incumbent
Maynard LaFond	2	12	Exhibit A 7 9/3/91	Exhibit D 6	Capitol	Exhibits C 14, D 6, E 15, and 16, letter report to incumbent, notify unsuccessful applicants, payroll authority, time record
Bruce Brannon	2	12	Exhibit A 8 3/3/92	Exhibit D 9 and 10	Shop warehouse	Exhibit C16, committee member, interviewer, letter report to incumbent

5. In Post Hearing Brief, the petitioner points out that the incumbent supervisors do not hire any staff members. They only participate as a committee member which through consensus recommends a person for hire. They do not "independently" hire any one. Additionally, the petitioner contended that because the rate of supervisors to employees is, in some case, disproportionate, the finding of a person as a supervisor is incompatible with the

³ Incumbents on an as needed basis, supervise additional staff for projects which require additional temporary staff. (Exhibit A+2)

1 finding of a person as a supervisor is incompatible with the
2 reality of supervision. (See Tucson Gas and Electric Company, 241
3 NLRB No. 23 100 LRRM 1489 1979).

4 6. Petitioner in Post Hearing Brief cited, Soil Engineering,
5 269 NLRB No. 7, 116 LRRM 1343 (1984) as supporting the position of
6 the NLRB that without final authority to hire, fire and discipline,
7 a person can not be considered a supervisor. The case of Somerset
8 Welding and Steel, 291 NLRB 913, 914; 130 LRRM 1135 (1988) is cited
9 by the Petitioner as the basis to include the eight incumbent
10 supervisors because their assignment or direction of work duties is
11 based upon experience and knowledge rather than "independent
12 judgement". Petitioner also referenced the case of John N. Hansen
13 Company, 293 NLRB No. 8, 130 LRRM 1497 (1989) in which the Board
14 held the recording of employees' hours and signing their time cards
15 was not a supervisory duty but a clerical function. Also cited to
16 support the conclusion that the incumbent supervisors were not
17 supervisors because their judgements do not direct work or are so
18 sporadic they are insufficient to justify supervisory status under
19 the Act were the cases of North Shore Weeklys, 317 NLRB 163, 150
20 LRRM 1012 (1995) and Delta Mills, 287 NLRB No. 38, 127 LRRM 1170 at
21 1174.

22 7. Relating to the performance appraisals completed by the
23 incumbent supervisors, the petitioner contended as follows;

24 ... nothing on the record (demonstrates) any so called
25 evaluations have any effect on wage increase
26 determination or job status. See Northcrest Nursing Home
27 313 NLRB 491, 498; 145 LRRM 1214 (1993). The ability to
28 evaluate employees, without more, is insufficient to
establish statutory authority. Passavant Health Center,
284 NLRB 887, 125 LRRM 1274 (1987).

1 III. CONCLUSIONS OF LAW:

2 1. The Board of Personnel Appeals has jurisdiction in this
3 matter pursuant to Section 39-31-202, MCA. Billings, Montana v.
4 Fire Fighters Local No. 521, 113 LRRM 3324, 651 P.2d 627, 39
5 St.Rep. 1844 (1982). The Court has approved the practice of the
6 Board of Personnel Appeals in using Federal Court and National
7 Labor Relations Board (NLRB) precedent as guidelines for
8 interpreting the Montana Collective Bargaining for Public Employees
9 Act as the State Act is similar to the Federal Labor Management
10 Relations Act. State ex. rel. Board of Personnel Appeals v.
11 District Court, 183 Mont. 223 (1977) 598 P.2d 1117, 103 LRRM 2297;
12 Teamsters Local No. 45 v. State ex. rel. Board of Personnel
13 Appeals, 195 Mont. 272 (1981), 635 P.2d 1301, 110 LRRM 2012; City
14 of Great Falls v. Young (III), 683 P.2d 185 (1984), 119 LRRM 2682.

15 2. Under Section 39-31-103(11) MCA, a "Supervisory employee"
16 is defined as follows;

17 "Supervisory employee" means any individual
18 having authority in the interest of the
19 employer to hire, transfer, suspend, layoff,
20 recall, promote, discharge, assign, reward,
21 discipline other employees, having
22 responsibility to direct them, to adjust their
23 grievances, or affectively to recommend such
24 action, if in connection with the foregoing
25 the exercise of such authority is not of a
26 merely routine or clerical nature but requires
27 the use of independent judgement. (emphasis
28 added)

24 3. In addition to the areas of authority exercised as
25 identified in Section 39-31-103(11), MCA, the Board of Personnel
26 Appeals has identified some secondary tests for use in determining
27 whether a position is supervisory. The secondary tests as
28 identified in UD 6-88 are as follows:

1 ...the employee being designated a supervisor;
2 the fact that he is regarded by himself and
3 others as a supervisor; the exercise of
4 privileges accorded only to supervisor;
5 attendance at instructional sessions or
6 meeting held for supervisory personnel;
7 responsibility for a shift or phases of
8 operations; authority to interpret or transmit
9 employer's instructions to other employees;
responsibilities for inspecting the work of
others; instruction of other employees;
authority to grant or deny leave of absence to
others; responsibility for reporting rule
infractions; keeping of time records on other
employees; receiving substantially greater pay
than other employees, not based solely on
skill and failure to receive overtime...

10 4. The record in this case shows the incumbent supervisors
11 participate and make independent judgements in their participation
12 in the hiring committees. Additionally, independent judgement is
13 exercised in the determination of questions and answers for
14 proposed interview material. The incumbents also assign work
15 responsibilities, direct other employees, are the first line of
16 supervision in the grievance procedures, and record time records.
17 The incumbent supervisors appraise subordinate staff and based on
18 those appraisals staff members are subject to continued employment
19 or reemployment in subsequent work seasons.

20 5. The totality of all of the factors as identified in the
21 law and by the Board lead to the conclusion that the incumbent
22 supervisors are properly excluded from the unit. They participate
23 in decisions relating to hiring and firing. They participate in
24 recall of staff as well as grievance resolution. They definitely
25 use independent judgment in the interest of the employer and direct
26 subordinate staff. This direction is not routine or clerical in
27 nature. Supervisory status under the NLRB and the Montana
28 Collective Bargaining Act as found in Unit Determination 15-87,

1 Unit Clarification 9-88, Unit Clarification 4-90, Unit
2 Determination 2-92 and Unit Clarification 4-94 all, in part,
3 support the conclusion that the incumbent supervisors in this case
4 are properly found statutorily excluded from the unit.

5 6. The cases cited in petitioner's post-hearing brief have
6 applicability to the facts in this case. As pointed out in section
7 1 above, the use of Federal Court and NLRB precedent as guidelines
8 has been approved by the Montana Supreme Court.

9 The following analysis addresses cases cited in petitioner
10 post-hearing brief:

- 11 • Tucson Gas and Electric Company, supra.

12 In this case, the Court found certain construction
13 coordinators were not excluded from the unit on the
14 basis of their supervisory responsibilities. In
15 large part, the Court determined the construction
16 coordinators were not statutorily excluded as
17 supervisors because the oral reprimands of the
18 construction supervisors "carried no formal weight
19 and, in fact, [were not] even included in the
20 employee's work record." Final authority to
21 evaluate staff members rested with the construction
22 coordinator section supervisor not the construction
23 supervisor. Tucson, p. 182.

24 In this case, the undisputed testimony offered by Personnel
25 Director Doug Monger was that if an incumbent supervisor gave a
26 subordinate seasonal employee a poor performance appraisal, that
27 person would not be rehired for the next season (Hearing tape 2,
28 foot 285). The performance appraisals completed by the incumbent
supervisors are included in the subordinate employee's personnel
files.

In Tucson, supra, the Court did find that construction
coordinator section supervisors, who among other things completed

1 final performance appraisals, were properly excluded from the unit
2 as supervisors.

3 • Soil Engineering, supra.

4 In this case, the Court found drillers who were in
5 charge of drill rigs were not supervisors in part
6 because they could not or did not fire or
7 discipline staff, and if found supervisory, a
8 disproportionate ratio of supervisory/employees
9 would result. The Board did, however, find a
10 mechanic supervisor who had some authority with
11 respect to overtime of employees in the shop and
12 authority to permit shop employees to leave was
13 properly identified as a supervisor. In this case,
14 if no vehicles (the work performed was equipment
15 repair) were needed immediately, the supervisor
16 mechanic decided the order of vehicle repair. He
17 also road tested vehicles, determined repair
18 needed, and ordered appropriate parts. He
19 determined which staff member was capable of doing
20 the repair jobs and his recommendation for
21 discharge of staff member was carried out by his
22 supervisor. He recommended the hire of two persons
23 who were not hired. The Board concluded the
24 mechanic exercised "independent judgment to
25 discharge, effectively recommend discharge of, and
26 responsibility to direct employees." Soil, p. 75.

16 The incumbent supervisors in this case more closely relate to
17 the mechanic who was found to be supervisorily excluded than to the
18 drillers in their respective exercise of supervisory duties and
19 responsibilities.

20 • Somerset Welding and Steel, supra.

21 In this case, the Court held lead men were not
22 supervisors. The lead men could not "hire, fire,
23 discipline, promote, transfer, reward employees
24 with wage increases or bonuses, recall or layoff
25 employees or to effectively recommend that.
26 Further...lead men [did] not have authority to
27 grant time off for vacations or authorize
28 overtime." (p. 913) The Court concluded the lead
workers did not exercise independent judgment and
only acted as quality control employees inspecting
the work of others.

27 This case differs from the Somerset case in that the incumbent
28 supervisors effectively do in the interest of the employer use

1 independent judgement to recommend recall, grant time off, and both
2 develop overtime authority and also determine staff use of
3 overtime.

4 • **Southern Bleachery and Paint Works**, supra.

5 In this case, the Board found machine printers were
6 not supervisors because they were craftsmen
7 assuring and directing based on their skill and
8 responsibility for operation of a complex machine.
9 When they exercised this supervision, they
10 supervised less skilled craftsmen. They were not
11 supervisors because they only incidentally
12 supervised co-workers. The machine printers
13 initialed merit increase slips, time cards,
14 accident reports, material requisition slips,
15 checked printed cloth (also checked by the machine
16 printer supervisor), received higher pay than co-
17 workers, and were asked if they knew of any
18 printers who would qualify for openings when
19 available. The machine printers were also found
20 non-supervisory because "operating and setting a
21 printing machine deprives the printer of time or
22 opportunity to oversee the work of other
23 employees." (p. 413)

24 In the present case, the incumbent supervisors did have time
25 for and performed independent supervisory responsibilities. They
26 drafted position notices, participated in hiring committee work -
27 including developing interview questions, answers, and tests. They
28 also, determined the order in which tasks or work would proceed,
29 which staff member would do the work and evaluated staff
30 performance. The incumbent supervisors in this case are not
31 comparable to the machine printers discussed in Southern Bleachery,
32 supra.

33 • **John Hanson Company**, supra.

34 In this case, the Board found a warehouse
35 supervisor not supervisorily excluded from a unit.
36 The warehouse supervisor primarily worked in
37 picking merchandise off shelves and delivering it
38 by forklift to the packing and shipping area. He
39 was paid \$600.00 more per month than other
40 subordinate staff, opened and closed the warehouse,
41 monitored time and signed time cards. Wage problems

1 were resolved by the business owners. He consulted
2 daily with the company owners regarding work
3 needed. He adjusted work assignments within the
4 limits set by the owners. Because most of the work
5 was routine, picking, packing, shipping, receiving,
6 and storing, close supervision was often
7 unnecessary and therefore daily work routine was
8 very regular.

9
10 The supervisor interviewed prospective employees
11 but only after the company owners asked that person
12 to report to work. Because the supervisory actions
13 of the warehouse supervisor were very routine and
14 did not involve use of independent judgment, the
15 Court found this supervisor not excluded by
16 definition in the NLRA.

17
18 The incumbent supervisors in this case supervised work which
19 was not strictly routine as in a warehouse. They did need to
20 exercise independent judgment in developing staff selection
21 criteria, selection committee work, work job assignments, staff
22 evaluations as well as time use allocation.

23
24 • Delta Mills, supra.

25 This case, as it relates to supervision, under
26 NLRB, involved two supervisors who only transferred
27 work assignment instructions from higher level
28 supervisors. They did not assign, direct, or
transfer staff but were higher paid than
subordinates. One of the supervisors spent half
his time performing preventative maintenance
inspections and the other time working in the shop,
including sweeping and cleaning the floor, hauling
trash, and cleaning equipment. The other
prospective supervisor indicated to his staff the
instructions he issued came from his supervisor.
When a staff member wanted time off, they would not
check with this supervisor but with his supervisor.

29
30 In this case, the incumbent supervisors independently
31 determined work assignments, evaluated staff, and their staff
32 understood the work assignment authority was not simply a conduit
33 from higher level supervision. Additionally, the incumbent
34

1 supervisors determined overtime use which did not exist in the
2 incumbents identified in Delta Mills, supra.

3 • Northcrest Nursing Home, supra.

4 This case involved the Board finding that certain
5 LPN charge nurses were not supervisors under the
6 Act. The Board examined the primary indica of
7 supervisory status and found the charge LPNs did
8 not truly have independent authority to assign
9 staff or grant time off other than sick leave.
10 They did not complete staff evaluations which
11 affected subordinate staff, wages and benefits or
12 continued employment. The directions given or
13 authority exercised were in furtherance of the
14 supervisor's professional patient care
15 responsibility not exercised in the interest of the
16 employer.⁴

17 In this case, the incumbent supervisors do have independent
18 authority to assign staff, can grant or deny leave, complete staff
19 performance appraisals which may result in failure to be rehired
20 for a subsequent season if the evaluation was poor. Additionally,
21 the circumstance found with the professionals in nursing home RNs
22 or LPNs (professional patient care responsibility) is not present
23 in this case. The incumbent supervisors are found to be exercising
24 their supervisory responsibilities "in the interest of the
25 employer". When considering supervision exercised by an LPN or RN,
26 the Board found consideration of the basis for the nurse's actions
27 important because a nurse, as a professional, acts, in large part,
28 based upon professional ethics and responsibility self imposed
rather than in the interest of the employer.

24 • Passavant Health Center, supra.

25 In this case, the Board concluded in-charge nurse
26 RNs and LPNs were not supervisory because they did

27 ⁴ This analysis relates to the Act language identifying a
28 supervisor as an individual having authority in the interest of
the employer to hire, transfer, suspend, etc.

1 not "possess the authority to discipline, evaluate,
2 or adjust grievances, nor (did) they possess any
3 other indica of statutory supervisory authority."
4 They only transferred grievances to the next level,
5 the cause for their disciplinary suggestions were
6 reviewed, and they could or would not send a staff
7 member home without first checking with a higher
8 level supervisor.

9 This case differs from the Passavant case as well as the some
10 of the conclusions identified in other cases cited in the
11 Petitioner Brief because both other primary indica as well as
12 secondary indicia of statutory supervisory authority is present

13 These primary indica include working "in the interests of the
14 employer" in assigning work, directing employees, and to a strong
15 degree, participating in the hiring process, i.e., draft position
16 announcements and interview questions and answers, as well as being
17 an equal voting member of the hiring committee. The secondary
18 indicia include; supervisory designation and recognition, shift
19 responsibility, interpreting instructions, authority to grant or
20 deny leave, reporting rule infractions, keeping of time records and
21 receipt of higher pay.

22 7. The incumbent supervisors fall within the definition of
23 supervisory employees as identified in Section 39-31-103(11), MCA
24 and, therefore, are excluded from the unit under application of the
25 Collective Bargaining Act for Public Employees.

26 **V. RECOMMENDED ORDER:**

27 IT IS ORDERED the Unit Determination 28-95 is hereby
28 dismissed.

DATED this 18th day of December, 1995.

Board OF PERSONNEL APPEALS

By: Joseph V. Maronick
Joseph V. Maronick
Hearing Officer

1 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
2 shall become the Final Order of this Board unless written
3 exceptions are postmarked no later than January 10, 1996.
4 This time period includes the 20 days provided for in ARM
5 24.26.215, and the additional 3 days mandated by Rule 6(e),
6 M.R.Civ.P., as service of this Order is by mail.

7 The notice of appeal shall consist of a written appeal of the
8 decision of the hearing officer which sets forth the specific
9 errors of the hearing officer and the issues to be raised on
10 appeal. Notice of appeal must be mailed to:

11 Board of Personnel Appeals
12 Department of Labor and Industry
13 P.O. Box 6518
14 Helena, MT 59604

15 * * * * *

16 CERTIFICATE OF MAILING

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

21 Patrick McKittrick
22 Attorney at Law
23 PO Box 1184
24 Great Falls, MT 59403-1184

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

29 Paula Stoll
30 Labor and Employment Relations Bureau
31 Rm. 115, Mitchell Bldg
32 Helena, MT 59620

33 DATED this 18th day of December, 1995.

34 Christine A. Roland