

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

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11 IN THE MATTER OF UNIT DETERMINATION NO. 2-2007:

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13 MONTANA EDUCATION ASSOCIATION-)
14 MONTANA FEDERATION OF)
15 TEACHERS, NEA, AFT, AFL-CIO,)
16 Petitioner,)
17)
18 -vs-)
19)
20 MONTANA DEPARTMENT OF)
21 CORRECTIONS, MONTANA STATE)
22 PRISON,)
23 Defendant.)

NOTICE OF WITHDRAWAL OF
PETITION

24
25 *****

26 The petitioner in the above matter has notified the Board that it does not wish to
27 proceed to election. The Board is therefore closing its file on this matter.
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30 Dated this 17th day of August, 2010.
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33 BOARD OF PERSONNEL APPEALS
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37 By: 
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39 John Andrew
40 Board Agent
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CERTIFICATE OF MAILING

I, John Anderson, do hereby certify that a true and correct copy of this document was mailed to the following on the 17th day of August 2010, postage paid and addressed as follows:

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L. Daniel
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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANA EDUCATION
ASSOCIATION – MONTANA
FEDERATION OF TEACHERS,
NEA, AFT, AFL-CIO,

Petitioner,

v.

MONTANA DEPARTMENT OF
CORRECTIONS, MONTANA
STATE PRISON,

Respondent.

Cause No. BDV-2008-1042

**ORDER ON CROSS-PETITIONS
FOR JUDICIAL REVIEW**

Before the Court are separate petitions for judicial review filed by the respective parties to this action — the Montana Education Association - Montana Federation of Teachers, NEA, AFT, AFL-CIO (Union) and the Montana Department of Corrections, Montana State Prison (MSP). Both seek judicial review of the October 24, 2008 amended final agency decision of the Montana Department of Labor and Industry Board of Personnel Appeals (BOPA).

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1 BOPA affirmed the hearing officer's ruling that the sergeant position meets the
2 statutory definition, but ruled that insufficient evidence was provided relating to the
3 supervisory status of case managers. (A.R., Doc. No. 58, Amended Final Order, at 6-7.)
4 BOPA modified the hearing officer's findings (8, 26-28, 33, 41, and 48) to reflect that
5 substantial evidence in the record did not support a finding that case managers exercise or
6 possess sufficient supervisory authority to be exempted under 103(11).

7 In April 2001, this Court ruled that both sergeants and case managers are
8 supervisory employees under a former version of Section 33-31-103(11), MCA. See, Mont.
9 Fed. of State Employees and Mont. Dep't of Corrections, Cause No. BDV-1999-166
10 (Mont. 1st Jud. Dist., April 5, 2001) (attached hereto). At the time this Court issued the
11 attached decision, the definition of supervisory employee stated:

12 (11) "Supervisory employee" means any individual having authority in
13 the interest of the employer to hire, transfer, suspend, lay off, recall, promote,
14 discharge, assign, reward, discipline other employees, having responsibility to
15 direct them, to adjust their grievances, or effectively to recommend such
16 action, if in connection with the foregoing the exercise of such authority is not
17 of a merely routine or clerical nature but requires the use of independent
18 judgment.

19 Section 39-31-103(11), MCA (2003). That definition was amended in 2005 and now states:

20 (11)(a) "Supervisory employee" means an individual having the
21 authority *on a regular recurring basis* while acting in the interest of the
22 employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign,
23 reward, or discipline other employees or to effectively recommend the above
24 actions if, in connection with the foregoing, the exercise of the authority is not
25 of a merely routine or clerical nature but requires the use of independent
26 judgment.

(b) The authority described in subsection (11)(a) *is the only criteria that
may be used* to determine if an employee is a supervisory employee. The use
of any other criteria, including any secondary test developed or applied by the
national labor relations board or the Montana board of personnel appeals, may
not be used to determine if an employee is a supervisory employee under this
section.

Section 39-31-103(11), MCA (emphasis added).

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1 evidence, the Court is to determine whether the agency misapprehended the effect of the
2 evidence. Third, even if substantial evidence exists and the effect of the evidence has not
3 been misapprehended, the Court can still determine that a finding is clearly erroneous when,
4 although there is evidence to support it, a review of the record leaves the court with the
5 definite and firm conviction that a mistake has been committed. *State Personnel Div. v. Child*
6 *Support Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citing *Weitz*, 284
7 Mont. at 133-34, 943 P.2d at 992). Conclusions of law, on the other hand, are reviewed to
8 determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dep't of Revenue*,
9 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

10 DISCUSSION

11 When interpreting statutes, the Court's function is to give effect to the intent of
12 the legislature. Section 1-2-101, MCA; *State v. Boulton*, 2006 MT 170, ¶ 12, 332 Mont. 538,
13 140 P.3d 482. "If possible, the intent of the Legislature is to be determined from the plain
14 language of the statute. If the intent can be determined from the plain language of a statute, a
15 court may not go further and apply any other means of interpretation." *Id.* (citations omitted).
16 This Court may not insert language which has been omitted, or omit language which has been
17 inserted. Section 1-2-101, MCA; *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 62,
18 Mont. 42, 139 P.3d 788. In other words, the Court must reject any construction which leaves
19 part of the language of the statute without effect and must correspondingly give effect to all
20 relevant statutory provisions. Section 1-2-101, MCA; *Spoklie v. Mont. Dep't of Fish, Wildlife*
21 *& Parks*, 2002 MT 228, ¶ 24, 311 Mont. 427, 56 P.3d 349; *Montco v. Simonich*, 285 Mont.
22 280, 287, 947 P.2d 1047, 1051 (1997); *Darby Spar, Ltd. v. Dep't of Revenue*, 217 Mont. 376,
23 379, 705 P.2d 111, 113 (1985).

24 In the present case, there is little doubt that BOPA was correct in determining
25 that the sergeant position meets the statutory definition of supervisory employee under Section

1 39-31-103(11), MCA, while the case manager position does not. Exhibit 115 is the current
2 position description for sergeants. Based on the testimony elicited during the three-day
3 hearing, hearing officer Hanchett made the following findings relating to sergeants:

4 17. Unit sergeants are responsible for ensuring the security of a
5 housing unit. Unit sergeants directly supervise the correctional officers
6 assigned to a housing unit. Sergeants assign tasks to correctional officers as
7 well as provide training and instruction to those officers. Sergeants also
8 administer discipline to correctional officers.

9 19. Unit sergeants have the authority to assign correctional officers to
10 work either as a floor officer or a cage officer. They also assign correctional
11 officers to conduct searches (known as shakedowns) of cells. They can also
12 assign a correctional officer to supervise inmates who are eating at the "chow
13 hall."

14 20. Unit sergeants assign correctional officers to particular posts and to
15 a particular job on a regular and recurring basis. In deciding which officer to
16 assign to a post, the sergeant must exercise his independent judgment. He
17 must weigh the individual CO's experience, his or her interpersonal skills, and
18 his or her personal strengths and weaknesses in conjunction with the needs of
19 the housing units. Placing the right officer in the right position is central to the
20 prison's overarching goal of maintaining security.

21 21. Unit sergeants have the authority to and in fact do engage in
22 discipline of correctional officers. Their authority to discipline is co-equal to
23 that of a unit manager. Sergeants exercise this authority by providing informal
24 corrective counseling and by providing verbal and/or written warnings
25 regarding performance of correctional officers.

26 22. Unit sergeants conduct regular performance appraisals of
27 correctional officers. Appraisals are used as part of the disciplinary process
28 and are also used in evaluating correctional officers seeking promotions.

29 23. Some, though not all, of the unit sergeants maintain supervisory
30 notes on correctional officers. These notes reflect both positive and negative
31 work performance of correctional officers.

32 24. Unit sergeants assume the duties and responsibilities of the unit
33 managers in the absence of the unit managers. They also have the same
34 authority as the unit managers to assign the correctional officers to various
35 positions in the unit.

36 25. Unit sergeants are also provide training in supervising
37 subordinates. This training includes proper methodologies in discipline,
38 training, and essentials of management.

39 (Recommended Order, at 6, 7.) While the position description and testimony relating to the
40 sergeant position satisfy this Court that the 103(11) requirements have been met, the

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1 testimony provided by case managers Robert Shaw and Roland Smathers was much different
2 than the testimony which was elicited during the April 2001 case.

3 In the former case, a case managers/correctional services coordinators could
4 "remove a correctional officer from the unit" and could "recommend an officer's suspension."
5 (See, attached Order, at 6.) In contrast, the current position description for case managers
6 (Exhibit 114) does not satisfy the requirements of 103(11), because case managers do not
7 perform any of the ten enumerated supervisory duties or possess the power to exercise any of
8 the supervisory duties on a regular or recurring basis. Case managers work directly with
9 inmates and do not directly supervise or manage correctional officers. Case managers only
10 perform supervisory functions when they are filling in for absent unit managers or sergeants.
11 While they are occasionally part of a hiring/disciplinary team, case managers that testified in
12 the present case provided a very different perspective of the case manager position. Both
13 Shaw and Smathers stated that they manage inmates, not other employees. (Hr'g Tr., at 474,
14 479.) Robert Shaw, a 17-year MSP employee, testified:

15 **Q. In your opinion are you a supervisor?**

16 **A. More of a lead worker than a supervisor, I guess.**

17 (Hr'g Tr., at 474:15-17.)

18 **Q. What if your sergeant and your unit manager are present, then are you a --**

19 **A. I'm not -- no, I'm not in the chain of command that way. I'm part of the unit
20 management team, but not part of the chain of command.**

(Hr'g Tr., at 474:25 - 475:4.)

21 **Q. Can you suspend, lay off, or recall employees?**

22 **A. No.**

23 **Q. Can you recommend them to be suspended, laid off or?**

24 **A. I could sit on a panel, kind of like the hiring panel, that's kind of how we
25 operate. Everything is done kind of in a panel, then the panel makes a**

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recommendation and that goes through personnel, and I'm assuming the warden.

Q. And that's – that would be your involvement with a promotion?

A. Yes.

Q. Is that right? How often do you sit on a panel?

A. Not very often. I would say probably within the last 15 years maybe five or six times.

(Hr'g Tr., at 480:21 – 481:12.) Shaw also testified that while he never prepared work schedules, he did have authority to issue written warnings to correctional officers.

Similarly, Roland Smathers, an 18-year MSP employce, testified that as a case manager he mainly did paperwork relating to the classification and assessment of inmates.

(Hr'g Tr., at 494:10-24.) If he were to fill in for a sergeant or case manager, he would have limited supervisory duties. (Hr'g Tr., at 494:25-495:9.) He further testified as follows:

Q. Do you have the authority to suspend employees?

A. No, I don't.

Q. Recommend their suspension?

A. No.

Q. Lay them off?

A. No.

Q. Recall them?

A. No.

Q. Promote them?

A. No.

Q. Reward them?

A. No.

Q. Direct employees when you're acting as a case manager?

- 1 A. Normally I don't. I don't really supervise officers if there is a sergeant there,
2 so. . . .
- 3 Q. What about disciplining?
- 4 A. No.
- 5 Q. So I assume not firing, either?
- 6 A. No, I've never fired anybody. Don't have the ability.
- 7 Q. How about hiring?
- 8 A. No.
- 9 Q. And the other piece of that is effectively recommending all those pieces,
10 can you effectively recommend any of these things?
- 11 A. No.

11 (Hr'g Tr., at 496:19 – 497:21.) Therefore, BOPA correctly modified the hearing officer's
12 findings and conclusions as they relate to case managers.

13 In contrast, both the job description (Exhibit 115) and testimony of sergeants
14 show that they perform supervisory and managerial functions in relation to correction officers
15 and others on a regular and recurring basis. Those findings were not modified by BOPA and
16 will not be modified by this Court.

17 **CONCLUSION**

18 Based on the above, it is hereby ORDERED, ADJUDGED, and DECREED
19 that the October 24, 2008 amended final order of the Board of Personnel Appeals is hereby
20 AFFIRMED.

21 DATED this 12 day of February 2010.

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23 _____
24 JEFFREY M. SHERLOCK
25 District Court Judge

24 pcs: Karl J. Englund
25 Michael Dahlem

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MEA-MFT filed exceptions to the hearing officer's recommended order with the Board. On appeal, MEA-MFT only contested the hearing officer's determination with regard to sergeants and case managers.¹ The Board reviewed the complete record and the parties presented oral argument on September 18, 2008. Stephen Bullock, attorney at law, represented MEA-MFT, and Denise Pizzini, assistant attorney general, represented MSP.

The standard of review employed by the Board for review is found in the Montana Administrative Procedures Act. *Mont. Code Ann. § 2-4-621(3)*. The Board may adopt the hearing officer's proposal for decision as the agency's final order. It may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Id.*; See also *Brackman v. Board of Nursing*, 258 Mont. 200, 851 P.2d 1055 (1993).

ANALYSIS

The Board of Personnel Appeal is authorized to decide what units of public employees are appropriate for collective bargaining. *Mont. Code Ann. § 39-31-201*. As part of this inquiry, the Board must consider which employees are and are not public employees. By definition, the term public employee does not include supervisory employees. *Mont. Code Ann. § 39-31-103(9)(b)(iii)*. When presented with the assertion that an employee should be excluded on the grounds that he or she is a supervisor, the party asserting supervisory status bears the burden of proof. See *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). Boiled down to the basics, the crux of this case revolves around what evidence is necessary, pursuant to Section 39-31-103(11), MCA, for a party to meet its burden and to establish that an employee is a supervisory employee and therefore excluded from a bargaining unit.

In its deliberation of the case, the Board separated its consideration of this matter into two parts: (1) the proper interpretation of Section 39-31-103(11), MCA; and (2) given the proper interpretation, the application of this interpretation to the facts of the record. The statute at issue reads:

(11) (a) "Supervisory employee" means an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

¹ MSP did not contest the inclusion of MSP hearing officer(s) in the bargaining unit.

(b) The authority described in subsection (11)(a) is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test developed or applied by the national labor relations board or the Montana board of personnel appeals, may not be used to determine if an employee is a supervisory employee under this section.

Mont. Code Ann. § 39-31-103(11) (2007).

On appeal, MEA-MFT argued that Section 39-31-103(11), MCA, should be interpreted in a manner that would require MSP to provide evidence of the regular and recurring exercise of supervisory authority by sergeants and case managers. *MEA-MFT Opening Br. at 8.* In contrast, MSP's argued that the plain language of the statute only requires evidence that supervisory authority exists on a regular, recurring basis, and that tangible examples of the exercise of that authority are not necessary. *MSP Response Br. at 3.* The hearing officer's recommended order and analysis lands closer to the latter, but as discussed further, it is the Board's conclusion that the analysis in the recommended order does not go far enough.

The hearing officer determined that supervisory authority would be found to exist where (1) any one of the supervisory functions is found to exist, (2) the power (not the actual exercise of the power) to exercise any of the supervisory functions is found to exist, (3) the power can be exercised on a regular and recurring basis, and (4) there is corroboration of the power through evidence of actual supervisory authority as demonstrated by tangible examples. *Hearing Officer's Recommended Order at 13.* In sum, the hearing officer concludes that the authority must be there on a regular and recurring basis, and that the party asserting exclusion must provide tangible examples of the power to exercise authority, but not necessarily tangible examples of the actual exercise of that authority. The Board concludes that the hearing officer's legal conclusion is correct in part and erroneous in part. Specifically, the Board finds error with the hearing officer's interpretation of Section 39-31-103(11), MCA, on the grounds that the hearing officer's analysis fails to consider and give effect to the entire definition.

As noted by the hearing officer, when construing a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Hearing Officer's Recommended Order at 12 (citing Mont. Code Ann. § 1-2-201).* To this extent, the Board agrees with the hearing officer's conclusion that the terms "regular" and "recurring" are placed in the definition of "supervisory employee" in such a manner as to modify the term "authority." *Hearing Officer's Recommended Order at 13.* Thus, it is not necessary to provide evidence of the regular, recurring exercise of that authority. However, the definition of supervisory employee contains several provisions and when there are several

provisions or particulars in a statute, a construction should be adopted that will give effect to all. *Mont. Code Ann. § 1-2-201*. Given this guidance, the Board concludes that it was erroneous for the hearing officer to interpret the statutory language in isolation.

Section 39-31-103(11), MCA, states that a "supervisory employee" means "an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment." Practically speaking, the language of the statute anticipates that one or more of the listed "actions" will be taken (or effectively recommended) while "acting" in the interest of the employer. Further, common sense dictates that in order for a fact-finder to ascertain whether the authority vested in an employee is merely routine or clerical and whether it requires the use of independent judgment will require the fact-finder's consideration of a tangible example or examples of that employee exercising his or her authority.

Therefore, in sum, the Board concludes that the proper legal interpretation of Section 39-31-103(11), MCA, requires that the party contesting the inclusion of an employee into a bargaining unit on the basis of supervisory status must provide evidence or examples of the regular and recurring existence of the authority of the alleged supervisor to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend one or more of those actions. Additionally, the party asserting supervisory status must provide evidence or examples of the exercise of that authority.² This evidence must reflect actions that are not merely routine or clerical in nature and must reflect the use of the employee's independent judgment.

It should be noted that this interpretation of Section 39-31-103(11), MCA, is not inconsistent with prior recommended orders that have been issued since the legislative amendments of 2005 to the definition of "supervisory employee." See *Montana Dep't of Correction – Montana State Prisons and Montana Correctional Enterprises v. Federation of Montana State Prison Employees, Unit Clarification No. 10-2005 (Case No. 1191-2005)*. As noted in that case, speculative evidence regarding supervisory authority was insufficient and the Board, in most cases, will not consider "prospective duties or circumstances in

² A question raised by the Board's interpretation, and argued by MSP on appeal is: what if a "supervisor" has not had the occasion to exercise supervisory authority during his or her tenure? Granted, the Board's interpretation may prove problematic for the freshly minted supervisor, but the dilemma lessens over time given the fact that the statutory definition provides the party seeking exclusion ten separate possible actions and "the effective recommendation" of ten separate possible actions. Once the party seeking to exclude establishes regular, recurring authority, presumably it should not take an extensive amount of time to provide tangible examples or evidence of the exercise of that authority.

determining bargaining units.” *Id.* at 9 (citing *Harlem Public Schools, UC 5-2001* (September 19, 2001); See also *Jefferson County v. Jefferson County Public Employees Local 4538, Unit Clarification No. 2-2006* (Case No. 726-2006) (hearing officer analyzed the “exercise” of statutory criteria); *Montana Education Assoc. – Montana Federation of Teachers, Unit Determination No. 9-2006* (Case No. 1730-2006)

Turning to the findings of the hearing officer and applying the modified interpretation of the statute, the Board finds that there is sufficient competent evidence in the record to support the hearing officer’s determination that the sergeants are supervisory, however, the same is not true for the case managers.

Broadly speaking, the hearing officer based his conclusion that the case managers were supervisors on the grounds that case managers have “actually” been involved in hiring panels and have the power to independently initiate and carry out discipline. *Hearing Officer’s Recommended Order at 16.*

Starting with the latter, the two case managers that testified may have felt that they had the authority to discipline, but the record is devoid of any tangible example of a case manager (acting in his role as a case manager) actually exercising this authority in a manner that required the use of his independent judgment. When asked to give a general overview of the case manager position, Case Manager Smathers testified a case manager “mostly does paperwork.” Tr. 494, l. 17. Case Manager Shaw testified that a case manager manages the inmates, not employees. Tr. 475, l. 20 – 22. The record reflects that it is the case manager’s job to make sure the inmate is doing the required treatment and groups that he is supposed to be doing so that he can go to parole. Tr. 494, l. 17-21. When it comes to discipline, both Shaw and Smathers indicated that they exercise disciplinary authority, but this was in situations where they were filling in for unit sergeants and unit managers. Tr. 487, l. 17 – 25; Tr. 495, l. 1 – 9; Tr. 499, l. 11- 25. The supervisory authority of MSP’s unit sergeants and unit managers is not at issue – the question the Board is looking at is whether a case manager acting in his role as a case manager qualifies as a “supervisory employee.” The Board finds that MSP failed to provide a tangible example of a case manager exercising supervisory disciplinary authority.

Similarly, regarding hiring authority, there was evidence that case managers participated as members of hiring panels. Tr. 481, l. 20 – 21; Tr. 500, l. 23 – 24. However, the hearing officer did not find, and the record does not support, a finding that a case manager’s mere presence on a hiring panel resulted in an effective hiring recommendation.³ The Board finds that MSP failed

³ In the hearing officer’s recommended order, in findings 49, 50, and 51, the hearing officer notes that MSP sergeants, lieutenants, and captains testified regarding the outcome of their participation in the hiring panels, specifically that the panel’s recommendation resulted in the applicant being hired. The same is not true for case managers. The case managers did not testify that their participation on a hiring panel resulted in an effective recommendation. “A

to provide a tangible example of a case manager exercising supervisory hiring authority.

Given the factual and legal conclusions of the Board, the case managers are not supervisors. Accordingly, the Board adopts and incorporates the recommended order's Findings of Fact Nos. 1 through 7. The Board adopts finding number 8, except for the last sentence where it references case managers having supervisory authority over correctional officers. The Board adopts and incorporates findings 9 through 25. The Board amends and modifies the findings that were made concerning case managers, specifically 26 through 28, 33, 41, and finding 48, to reflect that the substantial evidence in the record does not support a finding of that case managers' exercise of supervisory authority. The hearing officer's analysis is incorporated to the extent that it is consistent with the Board's legal conclusions. The conclusions of law are as follows:

CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.
2. The proper legal interpretation of Section 39-31-103(11), MCA, requires that the party contesting the inclusion of an employee into a bargaining unit on the basis of supervisory status must provide evidence or examples of the regular and recurring existence of the authority of the alleged supervisor to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend one or more of those actions. Additionally, the party asserting supervisory status must provide evidence or examples of the exercise of that authority. This evidence must reflect actions that are not merely routine or clerical in nature and must reflect the use of the employee's independent judgment.
3. Captains, lieutenants, sergeants are supervisory positions as contemplated by the language in Mont. Code Ann. § 39-31-103(11) and are therefore properly excluded from the bargaining unit.

purported supervisor does not exercise significant autonomy and control over hiring where he/she merely participates in a hiring panel. Supervisory status in hiring occurs where the employee's recommendations amount to a true exercise of the hiring authority or the employee, rather than the panel, makes the effective recommendation. Supervisory status has been found where the purported supervisor had the authority to choose and call in substitute employees from an employer's list. This action was found to be an exercise of independent judgment sufficient to meet the statutory criterion." State of California, Employer, and California Union of Safety Employees, Exclusive Representative, 14 PERC (LRP) P21,074; 1990 PERC (LRP) LEXIS 224 (internal citations omitted).

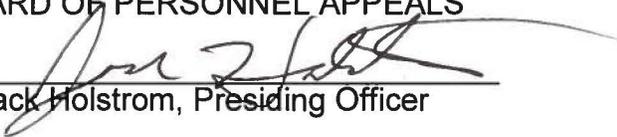
4. The positions of case manager and hearing officer are not supervisory within the meaning of Mont. Code Ann. § 39-31-103(11) and are therefore properly included in the unit.

ORDER

An election by secret ballot shall be conducted as soon as possible in accordance with the rules and regulations of the Board of Personnel Appeals, among employees in the bargaining unit. The bargaining unit shall consist of case managers and hearing officers only. Captains, lieutenants, sergeants should be excluded from the bargaining unit as they are supervisors.

DATED this 24~~th~~ day of October, 2008.

BOARD OF PERSONNEL APPEALS

By: 
Jack Holstrom, Presiding Officer

Board members Johnson, Whiteman, concur.

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, , do hereby certify that a true and correct copy of this document was mailed to the following on the 24th day of October, 2008:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 2-2007:

MONTANA EDUCATION ASSOCIATION-)	Case No. 226-2007
MONTANA FEDERATION OF TEACHERS,)	
NEA, AFT, AFL-CIO,)	
)	
Petitioner,)	
)	
vs.)	
)	
MONTANA DEPARTMENT OF)	
CORRECTIONS, MONTANA STATE PRISON,)	
)	
Respondent.)	

FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

I. INTRODUCTION

This matter involves the question of whether the captains, lieutenants, sergeants, case managers, and hearing officers employed by the Montana State Prison are supervisory employees that are excluded from the protections of Montana's Public Employees Collective Bargaining Act. Hearing Officer Gregory L. Hanchett convened a unit determination hearing in this matter on May 8, 9, and 10, 2007. Stephen Bullock, attorney at law, represented the Montana Education Association-Montana Federation of Teachers, NEA, AFT, AFL-CIO (hereinafter "union"). David Ohler, assistant attorney general, represented the Montana Department of Corrections (hereinafter MSP).

MSP's Exhibits 101 through 115, 118 through 120, 121, 122, 124, 125, 127, 132, 134, 137, 147, 151, 156, 163, 165, 167, 169, 176, 178, 182, 184, 185, 187, 188, 190, 193, 195, 197, 198, 199, 201, 203, 205 through 210, 212, 214, 216, 231, 235, 238, 240, 245, 247, 251, 260, 262, 265a, and 270 were admitted into evidence. The union's Exhibit 1 (the interview ratings, the 4/25/05 incident report form, the 8/15/06 letter from Captain Malcolm to Deputy Warden Swanson, the 3/28/06 Wood e-mail, the 7/19/05 warning notice, and the 8/22/03 incident report form only), Exhibit 2 (the interview ratings and the 5/17/04 warning notice only), Exhibit 3, Exhibit 4 (pages 1, 2, 3, 4, 5, 6, incident report form dated 10/28/05, incident report form dated 12/28/05, the 2/1/06 provision document, the 7/30/06 provision document and the 11/10/06 time card only), Exhibit 5, Exhibit 6 (pages 1 and 2 only), Exhibit 7 (Bouley e-mail only), Exhibit 8 (page 1 only), Exhibit 10 (page 1 and the e-mail dated 12/06/06 from Cynthia Davenport only), Exhibit 12 (2/22/06 incident report form only), Exhibit 18 (Shaw supervisory notes only), and Exhibit 25 (12/2/06 George Smith e-mail, 12/30/06 interviews, 7/9/06 discovery letter and the security major job profile only) were also admitted into evidence. Prison Warden Eugene Mahoney, Deputy Warden Lee Swanson, Human Resources Director Cynthia Davenport, Paula Stoll, Captain Barry Malcolm, Lieutenant Art Garrison, Sergeant Tim Mazzone, Sergeant Bruce Miller, Sergeant Bill Hitchins, Case Manager Robert Shaw, Case Manager Roland Smathers, and Hearing Investigator David Pentland all testified under oath.

Prior to hearing, MSP filed a motion for summary judgment arguing that as a matter of law sergeants and case managers were supervisory because they had been deemed to be such in a 1997 Board of Labor Appeals decision. This motion was denied because the statutory definition of supervisory personnel had materially changed since the time of that decision. After the close of the hearing in this matter, the union conceded that unit managers were not properly part of the bargaining unit, leaving only the question of whether captains, lieutenants, sergeants, case managers, and hearing officers were or were not supervisory personnel for purposes of the public employees collective bargaining act. For the reasons stated below, the hearing officer finds that the captains, lieutenants, sergeants, and case managers are supervisory personnel and are exempted from the protections of the public employees collective bargaining act. The hearing officers, however, have not been shown to be supervisory personnel and therefore can be part of a bargaining unit.

II. ISSUE

The parties have stipulated that the sole issue in this case is whether captains, lieutenants, sergeants, case managers, and hearing officers employed at MSP are supervisory personnel as provided in Montana Code Annotated § 39-31-103(11).¹

III. FINDINGS OF FACT

1. At all times material to this case, MSP was a public employer within the meaning of Montana Code Annotated § 39-31-103(10).

2. MSP is a correctional institution that houses convicted felons. It houses convicts ranging from low security felons to death row inmates. The prison itself is comprised of three separate compounds. The low security compound houses low security inmates, the high security compound houses inmates needing to be constrained by higher security measures, and the maximum security compound houses those inmates requiring the highest level of security.

3. MSP operates 24 hours each day, seven days per week, 365 days each year. There are three shifts, the first shift, the second shift, and the third shift.

4. MSP is organized into five branches. These branches are: (1) the security division which is overseen by a security major, (2) the inmate housing unit division overseen by an associate warden, (3) a support division overseen by an associate warden, (4) a correctional services division, and (5) a contract placement division.

¹ While it is not of any consequence to the determination of this case, the hearing officer feels constrained to point out that the union's statement in footnote 3 of its opening brief that "the hearing officer stated that, notwithstanding the fact that the only objection was whether the MSP employees were supervisors, MEA-MFT still needed to put on evidence of community of interest and other factors" is incorrect. In fact, at the beginning of the case the employer had not conceded that the other factors were not at issue. Record transcript, page 8, lines 9-18 (hereinafter RT p. __, ll. __). This case was denominated as a unit determination which would include the need to show community of interest and factors other than the question of supervisory status in the absence of a stipulation from the employer that such other factors were not at issue. *See, e.g.*, Mont. Code Ann. § 39-31-202. Thus, the hearing officer was quite correct to point out that in the absence of such a stipulation, evidence on those other factors was required. The employer, however, did eventually concede that the only issue was the question of the employees' supervisory status, obviating the need for any evidence on the other factors. RT p. 426. Only at that point could the hearing officer safely say that the other factors were not relevant. To avoid any confusion, the hearing officer wishes it to be completely understood that he is fully cognizant of the fact that the burden of proof and persuasion to show that an employee is a supervisor rests with the employer.

5. The primary goal of MSP is the security of the institution. To maintain the security of the institution, it is imperative that staff follow policies and procedures to the letter. MSP utilizes paramilitary procedures to ensure the security of employees, inmates, and the public at large. Ensuring the continued security of the institution requires a high level of supervision of subordinate employees.

6. Supervisory staff not only supervise fellow employees, they also supervise inmates. Inmates, like staff, are required to follow the institution's highly regimented procedures.

7. MSP's housing division operates under a housing unit management system. Under the unit management system, each housing unit is managed independently of the other units.

8. The chain of command flow sheet (Exhibit 101) shows the chain of command at MSP. MSP is administered by Warden Mahoney. Directly beneath the warden is the deputy warden, Lee Swanson. Beneath Deputy Swanson is the security major, Major Wood (in charge of prison security), and associate warden Beeson, who is in charge of the housing unit managers and the housing unit system. Security Major Wood directly supervises the command post captains, command post lieutenants, and sergeants. Command post lieutenants and sergeants supervise correctional officers assigned to fulfill command posts functions. Deputy Warden Beeson has overarching supervisory responsibility for unit managers. Unit managers have overarching responsibility for both case managers and unit manager sergeants assigned to the unit manager's unit. Unit manager sergeants and case managers supervise correctional officers assigned to the housing units.

Captains

9. The job profile for captains at MSP indicates that captains have the ability to hire, fire, ensure performance management, promote, supervise, and otherwise discipline employees underneath them. In addition, they compose daily and weekly work schedules, days off, and vacation time for correctional officers. Exhibit 106, page 4. This position also shares responsibility with lieutenant and staff sergeants in assigning correctional officers to their posts.

10. Assigning correctional officers to their respective posts requires the use of independent judgment. Persons doing the assigning must have knowledge of an individual CO's strengths and weaknesses and must evaluate those strengths and weaknesses in assigning the CO. This is a decision that is relegated to the decision maker.

Lieutenants

11. There are nine lieutenants at MSP. Six of them are command post lieutenants. There is also an emergency preparedness lieutenant and an interior perimeter security (IPS) lieutenant.

12. The job description for correctional lieutenant provides an accurate description of the supervisory work which persons occupying that position perform. Among other things, the correctional lieutenant assists captains with daily and weekly work schedules including scheduling regular days off, vacations, and other leave time. They also share in supervising all single man posts within the institution. The description also requires the incumbent to counsel, evaluate, and discipline subordinates. They also complete performance evaluations and conduct appraisal reviews on correctional officers.

13. The October 24, 2005 position description for emergency preparedness lieutenants (Exhibit 110) accurately reflects the supervisory duties which those lieutenants engage in while at work.

14. Lieutenant Art Garrison sits on promotional panels, hiring panels, makes work assignments for subordinates, has responsibility for disciplining subordinates, and completes evaluations for subordinates. Utilizing independent judgment as to the fitness of a particular officer for a particular post, Garrison assigns correctional officers to different posts. As Garrison noted, assigning the right person to the right job is "critical" to ensuring the security of the institution. RT p. 445, ll. 9 through 11. Garrison has served on three or four promotional panels, two of which were for promotions to sergeant and one of which was for a promotion to case manager. He regularly serves on hiring panels for new correctional officers.

15. As part of the hiring panel, Garrison asks questions, scores the answers against model answers, and then "ranks the candidates according to how we figured the scores were." RT p. 389, ll. 8 through 11. Garrison's evaluations of his subordinates are used to track discipline or a person's progress once discipline is noted. RT pp. 393 ll. 22-25, p. 394 ll. 1-2. In addition, new hires (new probationary correctional officers) are "evaluated every two months" and those evaluations "follow them." RT p. 395, ll. 1-13.

Sergeants

16. The position description for the unit sergeants indicates that the position performs supervisory duties and completes appropriate personnel functions within

the security unit. Exhibit 105, page 5. This function includes supervising all single man posts, completing performance evaluations as assigned by the shift commander, and meeting with correctional officers at least once per year, and is involved in hiring and promotion of correctional officers. The position description accurately reflects the supervisory duties which unit sergeants undertake in their positions.

17. Unit sergeants are responsible for ensuring the security of a housing unit. Unit sergeants directly supervise the correctional officers assigned to a housing unit. Sergeants assign tasks to correctional officers as well as provide training and instruction to those officers. Sergeants also administer discipline to correctional officers.

18. Correctional officers in a given housing unit perform in two positions in a housing unit, a floor officer position and a cage officer position. Floor officers move throughout the housing unit and directly supervise inmates. Cage officers are posted in a secure control cage and are charged with the responsibility of operating doors to both individual cells and to the cell block, and communicating with areas of the prison.

19. Unit sergeants have the authority to assign correctional officers to work either as a floor officer or a cage officer. They also assign correctional officers to conduct searches (known as shakedowns) of cells. They can also assign a correctional officer to supervise inmates who are eating at the "chow hall."

20. Unit sergeants assign correctional officers to particular posts and to a particular job on a regular and recurring basis. In deciding which officer to assign to a post, the sergeant must exercise his independent judgment. He must weigh the individual CO's experience, his or her interpersonal skills, and his or her personal strengths and weaknesses in conjunction with the needs of the housing units. Placing the right officer in the right position is central to the prison's overarching goal of maintaining security.

21. Unit sergeants have the authority to and in fact do engage in discipline of correctional officers. Their authority to discipline is co-equal to that of a unit manager. Sergeants exercise this authority by providing informal corrective counseling and by providing verbal and/or written warnings regarding job performance to correctional officers.

22. Unit sergeants conduct regular performance appraisals of correctional officers. Appraisals are used as part of the disciplinary process and are also used in evaluating correctional officers seeking promotions.

23. Some, though not all, of the unit sergeants maintain supervisory notes on correctional officers. These notes reflect both positive and negative work performance of correctional officers.

24. Unit sergeants assume the duties and responsibilities of the unit managers in the absence of the unit managers. They also have the same authority as the unit managers to assign the correctional officers to various positions in the unit.

25. Unit sergeants are also provided training in supervising subordinates. This training includes proper methodologies in discipline, training, and essentials of management.

Case Managers

26. Case managers primarily manage education, treatment, and programming of inmates. The position description reflects that case managers participate in the creation and implementation of the unit plan for the specific housing unit to which that manager is assigned. They are also charged with completing performance reviews for their subordinates and for providing supervisory coverage of the unit in the absence of the unit manager or unit sergeant.

27. Case managers have the authority at all times to issue written and verbal warnings to subordinate correctional officers. Case managers maintain supervisory notes to document the performance of their subordinates and disciplinary actions which include written warnings and verbal warnings. Written warnings become part of the subordinate's employment files. In addition, case managers are given training in handling discipline and properly supervising subordinates. This training includes techniques for appropriate discipline, essentials of management, and leadership and influence classes.

28. Case Manager Shaw has served on three or four hiring panels during the time that he has been a case manager. He has the power to issue verbal and written warnings to correctional officers serving in the housing unit where he is stationed. While there is a form for a written reprimand, it is clear that as a unit manager he has the independent authority to initiate the written reprimand and to describe the "special circumstances" that warrant the reprimand. RT p. 488, ll. 9 through 17. Such written reprimands become part of the offending subordinate's discipline file.
Id.

Hearing Officers

29. MSP utilizes the services of two hearing officers to provide inmates due process in disciplinary proceedings. One of the officers serves as a hearing officer and the other serves as a hearings investigator.

30. The job description for the hearing officer position indicates that the incumbent is responsible for adjudicating hearings for inmates charged with violating the inmate disciplinary code. The other hearing officer also investigates alleged infractions of the inmate disciplinary code. The position description also indicates that each position has supervisory duties over subordinates, which includes participating in the hiring of any subordinate and disciplining subordinates.

31. In practice, the hearing officers supervise one person who serves as a part time secretary for the two officers. The present hearing officers have the authority to recommend termination of their subordinate employee, though it appears that neither has ever done that. In addition, the only hearing officer who testified in this case, Officer Pentland, served on three or four hiring panels.

Discipline and Discharge

32. MSP has adopted a progressive discipline policy and also follows the State of Montana's discipline policy. The policy provides for both formal and informal discipline. Discipline progresses from "on the spot" counseling, to verbal warnings, to written warnings, which become part of the offending employee's file, then to leave without pay and on up to demotion or even discharge.

33. Captains, lieutenants, sergeants, and case managers all have the ability to impose discipline. Indeed, they have a responsibility to do so as the failure to impose discipline can result in the supervisor himself being disciplined. Both the power given to supervisors to implement immediate disciplinary action and the requirement that supervisors implement immediate corrective action are essential to MSP's central function to maintain security over inmates. Captains, lieutenant, sergeants, and case managers also have the ability to effectively recommend termination of subordinate employees.

34. The warden and deputy warden are not involved in and do not oversee discipline unless the recommended discipline involves a demotion or discharge.

35. Disciplining subordinates involves the use of independent judgment. A supervisor must determine the appropriate level of discipline, identify the

circumstance creating the need for the discipline, outline problems, and set out the supervisor's expectations for correcting the problem.

36. The human resources director reviews recommendations to demote or suspend in order to ensure that MSP implements discipline consistently and in accordance with applicable laws and regulations. The human resources director, however, does not recommend discipline. Those recommendations come from the captains, lieutenants, sergeants, and case managers.

37. In 2005, there were 10 employees who were discharged. In 2006, there were 16 or 17 correctional officers discharged. Over one-half of these discharges emanated from recommendations by captains, lieutenants, and/or sergeants. All of these officers' recommendations, except for one, were followed by upper management. In the one instance where the recommendation was not followed, the employee was placed on a last chance agreement at the behest of the union to which the employee belonged.

38. Over 90% of the time, upper management (the deputy wardens or the warden) concur in the discipline recommended by the captain, lieutenants, and sergeants. Only in rare instances has upper management overruled a decision regarding discipline. Typically, these occur only when it is evident that MSP might be exposing itself to some type of legal action by following a recommendation regarding discipline. In all other instances, it appears that the decisions of captains, lieutenants, and sergeants are effectively "rubber stamped."

39. Captain Malcolm works during the prison's third shift. During that time, he is the highest ranking officer and he is in command of the entire prison during his shift. RT p. 545, l.25, RT p. 546, l. 1. He has the authority at all times to hand out both verbal and written warnings to subordinates. In addition, Captain Malcolm has the authority to suspend an employee with pay and to send that employee home and after the fact he can notify the security major or personnel that he has done this. RT p. 534, ll. 21-25, p. 535 ll. 1 through 6.

40. Lieutenant Garrison has the authority at all times to discipline employees. Garrison has imposed discipline on subordinates by issuing both verbal and written reprimands and by sending them home without pay for abusing sick leave. RT p. 449, ll. 1 through 6. He utilizes independent judgment to determine whether there has in fact been an abuse of sick leave and he can impose a range of punishments which includes sending them home without pay. RT p. 449.

Hiring and Promotion Process

41. MSP utilizes hiring panels to hire correctional officers and to promote from the ranks of correctional officers to higher ranks. The hiring panel is comprised of three supervisory employees which are chosen from among the captains, lieutenants, sergeants, case managers and, on occasion, from the hearing officers.

42. Each month, a captain, lieutenant, sergeant, case manager, or hearing officer is assigned to chair a hiring panel. That person then finds two other persons to sit on the panel.

43. Each hiring panel typically interviews between 15 and 25 applicants for correctional officer positions. Applicants for both correctional officer positions and promotional positions are interviewed using standardized questions. Each interviewer independently assigns a score to each applicant based upon the interviewer's judgment of the applicant's response to each interview question. After the interview has concluded, all three interviewers meet to discuss and compare their independent assessments of the applicant. The interview panel then makes a collective decision as to whether to recommend hiring or not hiring the applicant.

44. Many of the questions that are used in the interview panels are questions that have been used for some time and are developed by the human resources department. Each interview question has a model answer which interviewers use to help them judge the quality of an applicant's answer.

45. Once the hiring panel has reached a consensus, its recommendations are forwarded to the personnel department at the prison so that the applicant's references can be checked. If the references are satisfactory, the applicant is typically offered the position. If the references are unsatisfactory, the applicant is not offered the job.

46. Where the background checks are not clear, the security major, the deputy warden, or the warden may be consulted. If the hiring panel recommends hiring the applicant, that applicant is almost always hired. During the year preceding the hearing in this matter, 65 new employees were hired by the hiring panels. In only one instance was the hiring decision not followed.

47. If the hiring panel recommends not hiring an applicant or not promoting an applicant, that applicant is almost never hired or promoted. There are occasions, however, where an applicant requests that upper management review the decision of

the hiring panel. Only on rare occasions has the upper management not concurred in the decision of the hiring panel.

48. In the vast majority of cases, upper management is not even involved in the hiring decision except to “rubber stamp” it. As Deputy Warden Swanson noted during his testimony, the first time he is typically involved in the hiring process of correctional officers is when he sees the new recruit at orientation. Unquestionably, the captains, lieutenants, sergeants, case managers, and hearing officers have the ability on a regular and recurring basis to effectively recommend the hire of correctional officers.

49. By way of example, the facts adduced at hearing show that Sergeant Mazzone as a member of a hiring panel has interviewed a total of 30 to 40 applicants. He could only think of two instances where the hiring panel’s recommendations were not followed. Sergeant Miller has served on 11 hiring panels that have interviewed a total of 70 to 80 applicants and he could not recall any time where the hiring panel’s recommendation was not followed. While acting as a member of the hiring panel, Sergeant Miller has the authority, using independent judgment, to effectively recommend the hiring of persons to fill the correctional officer positions. RT p. 363.

50. Lieutenant Garrison has been on interview panels that have interviewed more than 140 applicants. Of all of those instances, he identified only one time where the hiring panel’s recommendation was not followed. In that case, the hiring panel which Garrison sat on recommended that the applicant not be hired. That applicant was re-interviewed by a subsequent panel and hired.

51. Captain Malcolm has interviewed between 150 and 200 applicants for correctional officer positions. Out of all of those interviews, he could only recall two instances where the hiring panel’s recommendation was not followed. He has served on approximately 15 promotion panels where he has exercised independent discretion in determining which of several applicants to promote to new positions.

IV. DISCUSSION²

MSP contends that the positions at issue in this case all have the authority on a regular and recurring basis to exercise many of the indicia of supervisory power.

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The union argues that the supervisory authority that MSP contends the positions wield is largely illusory and is by no means regular and recurring.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes supervisory employees from the definition of “public employee,” a supervisory employee does not have the rights guaranteed by Montana Code Annotated § 39-31-201 and cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(iii). The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991).

Prior to 2005, Montana Code Annotated § 39-31-103(11)(a) defined a supervisory employee as “an individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.” In 2005, the language of this statute was amended in pertinent part to define a supervisory employee as “an individual having authority *on a regular, recurring basis* while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment (emphasis added).” Subpart (b) was also added in 2005 to provide that the authority articulated in subsection 11(a) “is the only criteria that may be used to determine if an employee is a supervisory employee.”

In construing a statute, “the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. § 1-2-201. “Statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required.” *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶46, 302 Mont. 209, ¶46, 14 P.3d 487, ¶46.

The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria. *E and L Transport Co. v. NLRB*, 85 F.3d 1258, 1269 (7th Cir. 1996). The statute requires only the *authority* on a *regular and recurring basis* to undertake at least one of the enumerated supervisory acts. Any of the positions exercising such authority is by the plain terms of the statute excluded from the collective bargaining rights of public employees.

In construing a statute identical in language to the pre-2005 Montana supervisory exception, the Iowa Supreme Court set forth a very succinct statement of the statute's requirements which sheds insight into the meaning of the Montana statute. In that case, the court noted:

The enumerated functions in the definition of supervisor are listed disjunctively; possession of any one of them is sufficient to make an employee a supervisor. (Citation omitted). The power must exist in reality, not only on paper. (Citation omitted). However, it is the existence of the power and not its exercise which is determinative. (Citation omitted). What the statute requires is evidence of actual supervisory authority "visibly translated into tangible examples . . ."

City of Davenport v. Public Employment Relations Board, 264 N.W. 2d 307, 314 (Iowa, 1978) (Reynolds, LeGrand and Rees, JJ., dissenting).

Applying these precepts to our statute makes it clear that supervisory authority as envisioned by our statute will be found to exist where (1) any one of the supervisory functions is found to exist, (2) the power (not the actual exercise of the power) to exercise any of the supervisory functions is found to exist, (3) the power can be exercised on a regular and recurring basis, and (4) there is corroboration of the power through evidence of actual supervisory authority as demonstrated by tangible examples. Importantly, the statute does not require that the supervisory authority be exercised on a regular and recurring basis. It simply requires that the supervisor have the ability on a regular and recurring basis to exercise the authority.

Had the legislature intended that supervisory authority be demonstrated through the regular and recurring exercise of the authority, it would have said as much. Instead, it tied the adjectives to the term "authority." Thus, consonant with the reasoning contained in the *City of Davenport* case, the hearing officer construes the Montana supervisory exception to be fulfilled where a position in question has the authority on a regular and recurring basis to exercise one or more of the statutory criteria.

At a minimum, it is apparent that the positions of captain, lieutenant, sergeant, and case manager have regular and recurring authority to discipline through verbal and/or written warnings that become part of the disciplined employee's file. This is the type of regular and recurring authority that makes all of these positions supervisory for purposes of Montana Code Annotated § 39-31-103(11)(a). This is amply demonstrated through the testimony of the warden, associate warden, the human resources director, the captain, lieutenant, sergeants, and case managers.

With respect to new hires of correctional officers, the warden, deputy warden, and human resources director are essentially not involved unless some type of protest is lodged about the decision (which, from the testimony, is a rare occurrence). If a protest is entered regarding a hiring decision, their involvement is essentially limited to ensuring that the hiring process has comported with applicable employment law. The warden, deputy warden, and human resource director are similarly not involved with promotional decisions. They are not involved with the decision to initiate discipline. They are not involved at all with issuing written or verbal warnings. Their involvement is limited to those situations of demotion, termination, or suspension without pay. Almost always, the recommendations of the captains, lieutenants, sergeants, and case managers are rubber stamped with respect to these more severe disciplines. Suspension with pay can be initiated and implemented by captains and lieutenants, subject only to an after the fact "o.k." by the security major.

Captain Malcolm has served on hiring panels that have interviewed and effectively recommended the hiring of as many as 200 people. He has been part of 15 or 16 hiring panels. He has the regular and recurring ability to effectively recommend and to carry out three day suspensions for subordinates who abuse sick leave, subject only to an after the fact "o.k." from the security major. He has regular and recurring authority to issue verbal and written warnings to subordinates. He utilizes independent judgment in determining when to utilize and initiate these supervisory powers.

Lieutenant Garrison sits on hiring and promotional panels and the hiring panels occur on a regular basis. He uses independent judgment to pick the other two members of the panel if he happens to be chairing the panel. He has independent discretion to discipline subordinates, including sending them home or making them work certain hours if they violate leave policies. At a minimum, he utilizes independent judgment to determine if and when a subordinate's conduct merits discipline. He can and does issue written warnings, and the written discipline that he imposes follows the offending subordinate and becomes part of the subordinate's employment file. Garrison not only has the authority to discipline on a regular and

recurring basis, he exercises it on a regular and recurring basis as demonstrated by the evidence in this case.

Sergeant Miller has served on 11 hiring panels during his tenure at MSP. As part of a hiring panel, he has the power, using independent judgment, to effectively recommend the hiring of correctional officers. In addition, he evaluates subordinates. Those evaluations can impact the subordinate's efforts to be promoted. RT p. 365, ll. 23-24. In addition, as Sergeant Miller noted, he can discipline correctional officers for doing something wrong. RT p. 367, ll. 17-20, RT p. 370, ll. 3-6. Likewise, Sergeant Hitchins has the power to give subordinates both verbal and written warnings. RT p. 379, ll. 11-14. They have this power at all times.

Case Manager Shaw has served on three or four hiring panels and has the power to issue verbal and written warnings to correctional officers serving in the housing unit where he is stationed. As a unit manager, he has the independent authority to initiate the written reprimand and to describe circumstances that warrant the reprimand. These reprimands become part of the subordinate's disciplinary file. Case Manager Smathers, though he has not done so, acknowledges that he has the authority to give a subordinate either a verbal or written warning. As is true with captains, lieutenants, and sergeants, the authority to give written or verbal reprimands is acceded to the case manager in order to carry out the employer's foremost interest of maintaining security in the institution.

In arguing that the positions are not supervisory, the union contends that MSP must show regular and recurring tangible examples of supervisory power in order to prove the regular and recurring nature of the authority. This argument overstates the requirements of the statute by conflating the need to show that the authority is regular and recurring with the requirement of the need for tangible proof of the authority. In fact, the clearly ever present power of captains, lieutenants, sergeants, and case managers to discipline subordinates is enough under the plain language of the statute to show that the positions wield the authority on a regular and recurring basis.

The union relies on *City of Davenport v. Public Employment Relations Board*, *supra*, to support its argument, but that case is factually distinguishable from the case before this hearing officer. In *Davenport*, the fire department whose captains and lieutenants were not found to be supervisors was a paramilitary organization whose rigid structure eliminated the need for independent judgment on the part of the captains and lieutenants. The captains and lieutenants in that case had no power to discipline subordinates. They could only give them a "chewing out." 264 N.W. 2d at 316. They had no power to hire, suspend or discharge subordinates. In order to

accomplish any formal discipline, the captains and lieutenants had to initiate a formal complaint against the subordinate which first had to be considered and then approved by upper management before any discipline could be taken. The power to initiate a complaint to obtain discipline was something which anyone in the organization, even the subordinates, could do. 264 N.W. 2d at 317.

That case stands in stark contrast to the one before this hearing officer. At MSP, the captains, lieutenants, sergeants, and case managers are involved in hiring panels, have the power to independently initiate and carry out discipline (e.g., written reprimands that become part of the subordinate's file or corrective counseling), and they have actually done these things as the evidence demonstrates. The paramilitary structure of MSP does not eliminate the regular recurring and independent authority of the positions to hire and discipline subordinates as demonstrated by the testimony at hearing.

A far more analogous case to the one at bar has concluded that Illinois police sergeants and lieutenants who had the authority to impose either oral reprimands or to initiate and serve personal incident reports which became part of the offending subordinate's file wielded the supervisory power that exempted them from the protections of the Illinois collective bargaining act. *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, 354 Ill. App. 3d 672, 820 N.E. 2d 1107 (2004). The police department had a progressive discipline policy that provided first for an oral reprimand, then for issuance of a personal incident report, third for a written reprimand, and on the final level for suspension without pay. 820 N.E. 2d at 1109. The sergeants' and lieutenants' power to discipline subordinates was limited to issuing oral reprimands and personal incident reports. The sergeants and lieutenants were required by department policy to impose discipline for infractions. The Illinois statute exempting supervisors from protection of the collective bargaining act was in all pertinent respects like Montana's pre-2005 statute. That statute defined a supervisor as someone "who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment."

The union in that case argued that the sergeants and lieutenants did not have the independent judgment envisioned by the statute because departmental policy required them to discipline subordinates. The Illinois Court of Appeals rejected this argument, finding that the mere fact that the sergeants and lieutenants had the discretion to choose whether to use oral reprimands or PIR's was adequate to show the requisite independent judgment required by the statute. *Id.* at 1113-14.

In the case at bar, the evidence shows that, at a minimum, captains, lieutenants, sergeants, and case managers have the ability to initiate and to choose between issuing written reprimands or simply taking corrective counseling action. Captains and lieutenants have the ability to effectively dock the pay of correctional officers who abuse leave privileges and to send them home for abusing those privileges. It is also clear that because of the employer's paramount concern for security, the captains, lieutenants, sergeants, case managers, and hearing officers wield this power at all times while on duty. Like the sergeants and lieutenants in the Illinois case, the fact that the policies of the institution might require them to do so does not lessen the discretion they have as to which method to utilize in a given case. The fact that it is all done to ensure that the overarching objective of security is met simply demonstrates that this is power wielded to further the interest of the employer. It does nothing to lessen the independent nature of their discretion. The preponderant evidence in this case demonstrates that all four positions have the independent authority on a regular and recurring basis to discipline subordinates. They are thus supervisory personnel within the meaning of the supervisory exemption contained in Montana Code Annotated § 39-31-103(11)(a).

MSP has failed to demonstrate, however, that the hearing officers are supervisory. While they have such power on paper, there is no supervisory authority "visibly translated into tangible examples . . ." The two officers have supervisory authority over one employee who only spends part of her time working for them. There is no evidence that the hearing officers have ever disciplined a subordinate. Officer Pentland's testimony regarding his work on hiring panels is insufficient under the facts of this case to show that the hearing officers have regular and recurring authority to hire or promote subordinates. Accordingly, no tangible examples exist to support the proposition that hearing officers are supervisors under the supervisory exception.

V. CONCLUSIONS OF LAW

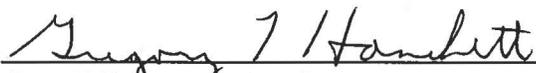
1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.
2. Captains, lieutenants, sergeants, and case managers are supervisory positions as contemplated by the language in Mont. Code Ann. § 39-31-103(11) and are therefore properly excluded from the bargaining unit.
3. The position of hearing officer is not supervisory within the meaning of Mont. Code Ann. § 39-31-103(11) and is therefore properly included in the unit.

VI. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accordance with the rules and regulations of the Board of Personnel Appeals, among the employees in the bargaining unit. The bargaining unit shall consist of the hearing officers only. Captains, lieutenants, sergeants, and case managers should be excluded from the bargaining unit as they are supervisors.

DATED this 14th day of December, 2007.

BOARD OF PERSONNEL APPEALS

By: 
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 7, 2008. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

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

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

CERTIFICATE OF MAILING

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

Stephen Bullock
Attorney at Law
P.O. Box 1330
Helena, MT 59624-1330

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

David Ohler
Special Assistant Attorney General
Montana Department of Administration
P.O. Box 200101
Helena, MT 59620-0101

DATED this 14th day of December, 2007.

Sandy Duncan