STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION, LABOR RELATIONS BUREAU, Petitioner,	)	
- vs -	)	FINAL ORDER
MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Respondent.	)	

* *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on September 10, 1981.

Exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order were filed by Jean Moffatt on behalf of the Petitioner, Labor Relations Bureau, Department of Administration, on September 30, 1981.

During oral argument before this Board on October 30, 1980, Jack Holstrom, attorney for the Department of Highways, modified the Petitioner's Exceptions to object only to the Recommended Order's conclusion that the following two positions were not supervisors: Materials Supervisor, GVW Enforcement Officer II. The Petitioners did not object or except to the Recommended Order's conclusion that the other three positions in the Order were not supervisory.

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

1. IT IS ORDERED that the Exception of Petitioner to the Findings of Fact, Conclusions of Law and Recommended Order's conclusion that Materials Supervisors are not supervisors is hereby denied.

IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board, with the exception that this Board concludes that the GVW Enforcement Officer II's are supervisors. The reasons for that conclusion are that the Board is pursuaded that the GVW Enforcement Officer II's possess the necessary independent judgment in making effective recommendations on assignment and direction of personnel to be supervisors.

DATED this 16th day of November, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 17 day of November, 1981:

Jean Moffatt, Labor Specialist
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Jennifer Jacobson

JAN 29 1982

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION, LABOR RELATIONS BUREAU,	)	
Petitioner,	)	
- vs -	)	RDER
MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC.,	)	
Respondent.	)	

* *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on September 10, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Jean Moffatt on behalf of the Petitioner, Labor Relations Bureau, Department of Administration, on September 30, 1981.

The Petitioner's exceptions were noticed for oral argument before the Board of Personnel Appeals at their October 30, 1981, meeting after which the Board issued its Final Order adopting the Findings of Fact, Conclusions of Law and Recommended Order of the hearing examiner with the exception that the GVW Enforcement Officer II's were excluded as supervisors. On November 19, 1981, the Respondent filed a Request for Rehearing alleging that new evidence was presented at the October 30, 1981, oral argument. The Request for Rehearing was opposed by the Petitioner.

After reviewing the record and considering the oral arguments, the Board of Personnel Appeals orders that the Request for Rehearing be denied for the reason that the Board's rules do not provide for a rehearing and the Board is therefore not

empowered to grant a rehearing. Bradco Supply Co. v. Larsen, ___ MT____, 598 P.2d 596 (1979).

DATED this 25th day of January, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 28 day of January, 1982:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-80:

DEPARTMENT OF ADMINISTRATION LABOR RELATIONS BUREAU Petitioner, vs. MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Respondent	)	FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER

* *

INTRODUCTION

The state filed a unit clarification petition under ARM 24.25.534 on August 18, 1980 and alleged that certain classes of positions, which are in the non-maintenance bargaining unit within the Department of Highways and which are represented by the Montana Public Employees Association, are supervisory and should, therefore, be excluded from the unit. On January 19 and 20, 1981 a hearing was held under authority of 39-31-207 MCA in accordance with ARM 24.26.630(5). Petitioner was represented by Jean Moffatt, Respondent by Dave Stiteler.

ISSUE

The issue raised is whether the incumbents of the below-listed classes of positions are supervisory employees as defined in 39-31-103(3) MCA:

Programmer Analyst II
Assistant Supervisor, Core Drill Section
Engineering Officer I
Materials Supervisor
GVW Enforcement Officer II

FINDINGS OF FACT

Based on the evidence on the record, including the sworn testimony of witnesses, I find as follows:

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PROGRAMMER ANALYST II

1. There are three Programmer Analyst II positions in the Systems and Programming Section of the Data Processing Bureau, Centralized Services Division, Department of Highways. They are classified at grade 14. Below them on the organization chart are a Programmer Analyst I at grade 13 and four Computer Programmer I's at grade 11. Immediately above them on the chart are the Supervisor of Systems and Programming and the Bureau Chief.

2. The Programmer Analyst II's perform duties involving the analysis, design, programming and maintenance of various computerized systems. They are assigned work and, in turn, assign work to the Programmer Analyst I's and Computer Programmer I's. If the work is done incorrectly they have them do it over again. The Analyst II's write up programs on how and what they want done and give it to the lower level employees.

3. They do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust grievances.

4. If one of the subordinate employees was to be suspended for a flagrant rule violation, the Analyst II would have to go to his superior and make a recommendation. The recommendation would be accepted if the superior believed he had sufficient grounds for the proposal. Recommendations on other personnel actions would be treated in like fashion.

5. A 1978 class specification for Programmer Analyst II shows, under the heading "Summary of Work," that incumbents "... may exercise supervision over personnel on a project or team leader basis on projects of limited magnitude and complexity. The 1978 Position Information Questionnaire of Timothy Cail, who was reclassified to Programmer Analyst

1 [illegible], 1976, shows that one percent of his time was
2 spent assigning work to other programmers and supervising
3 them. At that time he had two Programmer Analyst I's under
4 him.

5 ASSISTANT SUPERVISOR, CORE DRILL SECTION

6 6. The Assistant Supervisor of the Core Drill Section
7 is in the Geology Section of the Materials Bureau of the
8 Engineering Division, Department of Highways. The position
9 is classified at grade 14 and is currently occupied by
10 Leonard Mahlum. Mr. Mahlum is supervised by the Supervisor
11 of the Core Drill Section who is responsible to the Supervisor
12 of the Geology Section. The head geologist reports to the
13 Materials Bureau Chief.

14 7. There are ten employees under Mr. Mahlum and with
15 whom he works. They are Drill Operators I, II and III's at
16 grade 9, 10 and 13 respectively.

17 8. He does not have the authority to hire, transfer,
18 suspend, lay off, recall, promote, discharge, reward, discipline
19 or adjust grievances. He does evaluate, assign and direct
20 others in their work. He does not become involved in interview-
21 ing employees. His general duty is to assist in the supervision
22 of the drilling section operations.

23 10. Mr. Mahlum can make recommendations on some personnel
24 actions to his superior, Mr. Keiley, who could change them
25 if he thought it necessary.

26 ENGINEERING OFFICER I

27 11. Engineering Officer I's at grade 14 are located in
28 the eleven division offices of the Department of Highways.
29 They report to the Division Construction Supervisor and
30 assist him in administering the construction activities in
31 progress in the division. Such assistance consists of
32 compiling reports, handling correspondence and acting as a

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coordinator between the Construction Supervisor, the Project Managers and the general public. The Construction Supervisor reports to the Construction Bureau Chief who is responsible to Administrator of the Engineering Division of the Department of Highways.

12. The Engineering Officer I in the Missoula Division is responsible for furnishing the field people with 30-35 temporary survey aides each year. To accomplish that task he makes the necessary contacts from a list furnished by the personnel office, interviews those who show up and sends them to the field where they are supervised by field personnel. He has no authority over them once he places them on the payroll. His supervisor, Mr. Miller, could overrule any selection he made. His function regarding the placement of temporary survey aides is akin to that of a personnel officer.

13. One person, an Engineering Technician III at grade 13, is directly under the Engineering Officer I.

14. Engineering Officer I's do not have the authority to transfer, suspend, lay off, recall, promote, discharge reward, discipline or adjust grievances. They do assign and direct the activity of one person and they place temporary help on the payroll. They make recommendations regarding some personnel actions to their supervisor, the Division Construction Supervisor, who may or may not endorse them.

MATERIALS SUPERVISOR

15. Materials Supervisors are also located in the Highway division offices. They are directly responsible to either the Assistant Division Construction Supervisor or the Division Construction Supervisor. They have five permanent employees below them and at times have a couple of temporary people.

16. The incumbents of the Materials Supervisor positions are responsible for inspecting, sampling and testing materials

[illegible] They are also responsible for gravel prospecting and the administration of gravel crushing contracts.

17. Materials Supervisors do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust grievances. They assign work and direct employees who are classified as Laboratory Supervisor I at grade 12 and Laboratory Technicians at grades 9 and 11. They can make recommendations to their immediate supervisor on some personnel actions.

GVW ENFORCEMENT OFFICER II

18. There are eight GVW Enforcement Officer II's at grade 12 assigned to various areas around the state. They perform duties related to the enforcement of the laws, rules and regulations governing the registration, size and weight, safety and operating authority of commercial and farm vehicle traffic. There are from five to seven GVW Enforcement Officer I's at grade 11 assigned to each of the areas, they work under the GVW Enforcement Officer II's.

19. The hierarchy within the Gross Vehicle Weight Division of the Department of Highways begins with the administrator at the top followed by the Assistant Administrator, the Chief of the Enforcement Bureau, the Assistant Chief of the Enforcement Bureau, the GVW Enforcement Officer II's and the GVW Enforcement Officer I's.

20. GVW Enforcement Officer II's do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust grievances. They assign personnel to work stations, direct them, evaluate their work, train them on proper procedure and participate in hiring and disciplining. They can make recommendations on personnel actions to their immediate supervisor.

Assistant Chief of the Enforcement Bureau.

DISCUSSION

This is the second of two unit clarifications filed by the state on August 18, 1980 alleging that some of the positions in two of the bargaining units represented by the Montana Public Employees Association are supervisory and should be excluded. The first, UC 6-80, involved positions at the prison, this involves positions in the Highway's non-maintenance unit. Both center around similar factual situations and both require an application of the criteria listed in 39-31-103(3) to those facts. For those reasons, much of the discussion here will be repetitive of my discussion in UC 6-80 issued earlier.

The term "supervisory employee" as defined in 39-31-103(3) MCA is "...any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assisgn, reward, 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." Such employees are not public employees and are excluded from the Act.

The National Labor Relations Act, Section 2(11), contains the same definition. In NlRB v. Metropotilan Life Insurance Co., 405 F.2d 1169, 1173, 70 LRRM 2029 (1968), the NLRB was upheld in ruling that possession of one of the listed powers is sufficient to classify the individual as a supervisor.

In addition to the actual exercise of one or more of the listed powers, one may be excluded as a supervisor if he can effectively recommend a listed power. However, whether

in actual performance or in making a recommendation, to be excluded as a supervisor, one must use independent judgment. Unimedia Corps., 98 LRRM 1176 (1978); Poulty Enterprises, Inc. v. NLRB, 216 F. 2d 798, 802, 35 LRRM 2151.

Contrary to the declarations made by some of the witnesses at the hearing, there is not sufficient evidence on the record to support a conclusion that any of the incumbents of the five classes of positions have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances using independent judgment. In fact, the evidence supports the opposite conclusion. The lack of any real authority in those areas leaves the same remaining questions here as were discussed in UC 6-80. Namely, can any of the incumbents make effective recommendations in any of the areas listed in the statute using independent judgment and does the assigning and directing done by them require the use of independent judgment?

As in the first proceeding, UC 6-80, the employer attempted to show changes in duties and responsibilities of the position over a period of time and here they also stressed the emphasis a former Highway Director placed on reorganization and supervisory responsibilities. I made no findings related to those propositions because the question is whether these employees are supervisors under the Act's definition at the time of the hearing.

In City of Davenport v. PERB, 264 N.W. 2d 307, 98 LRRM 2582 (1978), the Iowa Supreme Court upheld the Iowa Public Employees Relations Board's determination that an effective recommendation was one which, under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course.

Inc., 552 F.2d 519, 94 LRRM 2950 (1977), upheld an NLRB ruling that assigning employees to work on a routine basis is insufficient to create supervisory status because it does not require the use of independent judgment within the meaning of the statutory definition. See also Phalo Plastics Corp., 127 NLRB No. 170, 46 LRRM 1221 (1960).

The employees occupying the positions involved in this case do not make effective recommendations using independent judgment on the personnel actions listed in the statute for many of the same reasons discussed in UC 6-80. All are one level removed from the workers whom they purportedly supervise. None has subordinates who have authority over lower level personnel. All are far removed from the upper levels of the hierarchy where, one might reasonably infer, significant decisions are made on all but the most routine personnel actions shown under the act. All but the Assistant Core Drill Section Supervisor have few employees under them. The Assistant Core Drill Section Supervisor has 10 people, however, he appears to serve as a conduit for relaying orders and instructions from his superior. There are several layers above all these positions. The NLRB considers whether the determination that certain employees are supervisors would create an unrealistic and excessively high ratio of supervisors to employees. Central Buying Service, 223 NLRB 77, 92 LRRM 1145 (1976); Pinecrest Convalescent Home, Inc., 222 NLRB 10 (1976), 91 LRRM 1082; Commerical Fleet Wash., 77 LRRM 1156 (1971).

The incumbents of the subject positions cannot be said to use independent judgment in assigning and directing the work of other employees. Their responsibility in those areas appear to be of a routine nature. They perform the

same kind of work as their subordinates. See McQuaide and City of Davenport, supra. They are lead workers. NLRB v. Harmon Industries, Inc. 565 F. 2d 1047, 1051, 96 LRRM 3198 (1977).

Consideration of secondary indicia is not necessary because the incumbents of these positions do not satisfy any of the criteria shown in the act.

CONCLUSION OF LAW

The Programmer Analyst II's; Assistant Supervisor, Core Drill Section; Engineering Officer I; Materials Supervisor; and the G.V.W. Enforcement Officer II's are not supervisory employees as that term is defined in 39-31-103(3) MCA.

RECOMMENDED ORDER

The state's petition to modify the non-maintenance bargaining unit in the Department of Highways represented by the Montana Public Employees Association is dismissed.

NOTICE

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

Dated this 10th day of September 1981.

BOARD OF PERSONNEL APPEALS

JACK H. CALHOUN
Hearings Examiner

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 10th day of September, 1981:

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EXHIBIT B
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