BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION: 6-88

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

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I. INTRODUCTION

A hearing on the above matter was held on June 13 and June 14, 1988, in Boulder, Montana, before John Andrew. The Montana Federation of State Employees was represented by Mike Dahlem and Dan Evans. The State of Montana, Montana Developmental Center, was represented by Tom Gooch.

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

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

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

The second unit was described as:

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

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

II. ISSUES

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

P.T./O.T. Supervisor

Staff Development Specialist II

Medical Records Administrator

Habilitation Relief Supervisor

Cottage Supervisor

Custodial Supervisor

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

Office Supervisor III

Administrative Assistant II

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

Prior to hearing the State stipulated that the positions not enumerated above and listed in the original petition could be included in the bargaining unit or units. It was further understood that the Administrative Assistant II designation applied to one individual as opposed to the entire class.

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

III. FINDINGS OF FACTS

COTTAGE SUPERVISORS AND

HABILITATION RELIEF SUPERVISORS

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

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

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

3. The HRS's cover those times not covered by the CS's. As such the HRS's supervise the same positions as the CS's. In addition the HRS's also indirectly supervise those positions on the grounds during their shift, e.g. housekeeping, engineers and nursing.

4. The number of employees supervised by CS's averages between fifteen and twenty four. HRS's might directly and indirectly supervise, depending on the shift, as many as fifty employees. Both CS's and HRS's are responsible for shift scheduling of employees.

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

6. Neither CS's nor HRS's receive overtime compensation. They receive compensatory time.

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

reduced to the three most qualified positions. From these finalists either the CS or the HRS interviews the individuals using tests or questions which they design. The CS or HRS decision as to whom to hire is then relayed to the personnel office. The personnel office then implements the recommendation of the CS or HRS.

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

8. Both CS's and HRS's have the ability to suspend or discharge employees. Both actions are subject to review either through the contract grievance route or by administrative review of superiors of the HRS's and CS's. It is apparent from the testimony that Mr. Plaska gives his CS's and HRS's considerable latitude in their suspension and discharge responsibility.

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

10. The CS's and HRS's assign work, schedule shifts, pull employees and in general perform the functions of supervisor to subordinate. CS and HRS positions oversee the day to day and hour by hour activities of their subordinates. Two CS's, who testified, Art Hall and David Bristow,

estimated that supervision constituted fifty percent of each day.

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

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

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

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

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

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

CUSTODIAL SUPERINTENDENT

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

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

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

20. The Custodial Superintendent does have the authority to hire, fire and suspend employees.

21. The Custodial Superintendent does adjust grievances and is involved in the first step of the grievance process.

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

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

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

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

ADMINISTRATIVE ASSISTANT II

AND OFFICE SUPERVISOR III

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

27. Confidential matters involving collective bargaining were previously handled by secretaries assigned to the superintendent. Those secretarial positions are now proposed to be part of one of two pools. One pool is to be supervised by the Office Supervisor III. The other is to be supervised by the Administrative Assistant II.

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

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

30. The Office Supervisor III is attached administratively to the Superintendent. Through reorganization it may be attached to Administrative Services. The position will work for Fiscal Services, Administrative Services and the Superintendent.

31. If no confidential employee were carved out from either the Administrative Assistant II or Office Supervisor III positions there would be no confidential position available to the superintendent, Mr. Dolan or other personnel involved in the development formulation and implementation of labor relations policy.

MEDICAL RECORDS ADMINISTRATOR

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

33. The hiring process in Medical Records works the same as it does in other departments at the Montana Developmental Center.

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

35. Ellen Rae Thiel, the incumbent, completed a position description on November 15, 1985, delineating the duties in her position. She furthermore testified as to those duties and responsibilities. As the position description indicates, and as her testimony verifies, Ellen Ray Thiel hires people for the medical records department. She further does evaluations of the employees, assigns them tasks and assures that the policies, procedures and objectives she has set are being fulfilled.

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

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

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

STAFF DEVELOPMENT SPECIALIST II

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

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

hand knowledge of the position is limited. He has not had an opportunity to hire employees, nor have any disciplinary situations arose during his tenure. Both hiring and disciplinary actions are within the scope of Mr. Roeber's authority.

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

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

43. The Staff Development Specialist performs employee evaluations.

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

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

46. Although many Training Officers duties are routine in nature the authority is with the Staff Development Specialist to supervise their daily activities and manage the functioning of the department.

PHYSICAL THERAPY SUPERVISOR

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

48. The Physical Therapy Supervisor currently supervises one occupational therapist and 10 or 11 trainers.

49. The Physical Therapy Supervisor devotes 50% of her time in supervising her subordinates.

50. The Physical Therapist Supervisor hires employees.

51. The Physical Therapist Supervisor is involved in adjustment of grievances and has participated in grievance handling up to step two.

52. The Physical Therapy Supervisor position is responsible for overseeing employees who are presently in a bargaining unit.

53. The Physical Therapy Supervisor hires employees and has the ability to suspend employees. As a practical matter the incumbent does review suspensions with her supervisor, nonetheless the position does have the power to suspend with out prior consulation.

54. The Physical Therapy Supervisor evaluates employees.

UNIT COMPOSITION

55. All of the employees at the Montana Developmental Center are governed by common personnel policies. They also receive the same benefits, e.g. vacation, sick leave, holidays, etc. Their pay and classification is controlled by the same statute.

56. The employer points to eligibility for overtime as a difference between the proposed professional and clerical/patient care units. This appears to be a major element in the State's position. Other than the fact that the employer choses to call some of these people "professional" and therefore not eligible for overtime there is no convincing evidence that, in fact these people meet the definition for exclusion from overtime as bona fide professional employees.

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

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

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

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

IV. DISCUSSION

EXCLUDED POSITIONS

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

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

As defined in the LMRA the term "supervisor" means "any 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, or to adjust their grievances, or effectively recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment". The definition embodied in 39-31-103(3) MCA is essentially the same. The NLRB has consistently held that "the definition of supervisor and the twelve tests applicable to the term are written in the disjunctive. Thus, the possession of any one of the listed powers is sufficient for exclusion. NLRB v. Metropolitan Life Company, 405 F.2d 1169, 1173, 70 LRRM

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

In the event that the twelve initial test are not met or in the event that there are borderline questions as to whether the individual is a supervisory employee the NLRB has looked to certain secondary tests such as the employee being designated a supervisor; the fact that he is regarded by himself or others as a supervisor; the exercise of privileges accorded only to supervisors; attendance at instructionial sessions or meetings held for supervisory personnel; responsibility for a shift or phases or operation; authority to interpret or transmit employer's instructions to other employees; responsibility for inspecting the work of others; instruction of other employees; authority to grant or deny leave of absence to others; responsibility for reporting rule infractions; keeping of time records on other employees; receipt of substantially greater pay then other employees, not based solely on skill; and failure to receive overtime.

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

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

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

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

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

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

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

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

UNIT COMPOSITION

The employer did not demonstrate any overriding concerns that would dictate two units. The presence or absence

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

V. CONCLUSIONS OF LAW

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

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

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

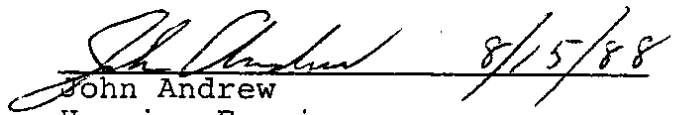
VI. RECOMMENDED ORDER

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

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

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

Board of Personnel Appeals
By:



John Andrew
Hearing Examiner

NOTICE:

Exceptions to these Findings of Facts, Conclusions 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 Appeal.

CERTIFICATE OF SERVICE

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

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