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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 12-97:

STATE LABOR RELATIONS/ DEPARTMENT OF TRANSPORTATION Petitioner	)	
-vs-	)	FINAL ORDER
MONTANA PUBLIC EMPLOYEES ASSOCIATION Respondent	)	

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The above-captioned matter came before the Board of Personnel Appeals (Board) on June 26, 1997. The matter was before the Board for consideration of two issues. The first issue to be considered was the timeliness of the Petitioner's filing of its Exceptions to the Findings of Fact; Conclusion of Law; and Recommended Order of Joseph Maronick, Hearing Officer, dated April 29, 1997. The second issue to be considered, if necessary, was the Petitioner's exceptions.

Appearing and arguing before the Board were Jim Adams, Associate Director of the Montana Public Employees Association and Paula Stoll, Chief of the Labor Relations and Employee Benefits Bureau of the Department of Administration. All appearances were in person.

It is uncontested that the Petitioner failed to file exceptions within 20 days from the issuance of the hearing officer's Findings of Fact; Conclusions of law; and Recommended Order. The Board's rules in the relevant part state as follows:

> (2) If a member of the board or an examiner appointed by the board presides over the hearing, the member, or the examiner, as the case may be, shall issue and cause to be served on the parties to the proceeding findings of fact, conclusions of law and recommended order, which shall be filed with the board, and if no written exceptions specifically stating to which part of the recommended order exceptions is being taken are filed with this board within 20 days after service of the recommended order upon the parties, or within such further period as the board may authorize, the recommended order shall become the order of the board.

Mont. Admin. R. 26.26.215(2). As per the above rule, the recommended order became the order of the Board when no exceptions were filed within 20 days of service of the recommended order. The Petitioner's defense that it believed the 20 days to mean working days is not acceptable to the Board. The Board's rules clearly provide the "term 'days' means calendar days unless otherwise specified." *Mont. Admin. R. 24.26.206(1).*

For the foregoing reasons, the Board orders as follows:

1. IT IS HEREBY ORDERED that the exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are disregarded as they were not timely filed.
2. IT IS FURTHER ORDERED that the Recommended Order is the order of the Board by operation of *Mont. Admin. R. 24.26.215(2).*

DATED this 11 day of July, 1997.

BOARD OF PERSONNEL APPEALS

By: James A. Rice, Jr.
James A. Rice, Jr.
Presiding Officer

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Board members Rice, Talcott, Hagan and Perkins concur.

Board member Foley dissents.

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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.

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* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certified that a true and correct copy of this document was mailed to the following on the 16th day of July, 1997 :

JIM ADAMS, ASSOCIATE DIRECTOR
MONTANA PUBLIC EMPLOYEES ASSOCIATION
PO BOX 5600
HELENA MT 59604-5600

PAULA STOLL, CHIEF
LABOR RELATIONS & EMPLOYEE BENEFITS BUREAU
STATE PERSONNEL DIVISION
DEPARTMENT OF ADMINISTRATION
ROOM 130 - MITCHELL BUILDING
HELENA MT 59620

* *

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

IN THE MATTER OF UNIT CLARIFICATION NO. 12-97:

STATE LABOR RELATIONS/ DEPARTMENT OF TRANSPORTATION, Petitioner, vs. MONTANA PUBLIC EMPLOYEES ASSOCIATION, Respondent.	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

* * * * * * * * * *

I. INTRODUCTION

On February 12, 1997, Paula Stoll, Chief Labor & Employment Relations, filed a petition for unit clarification seeking supervisory exemption of position 55207, Accounting Technician, Class Code 160013 which is included as a member of Respondent, Montana Public Employees Association (MPEA) located in the Montana Department of Transportation. The Unit is described as "All employees of the Department of Transportation except maintenance employees."

By stipulation, the respondent waived the 20 day response time line specified under 24.26.630(4) ARM and the case was transferred to Hearings for an expedited hearing process.

A hearing was held in person in Helena, Montana on March 18, 1997 before the below signed Hearing Officer. Paula Stoll represented the petitioner and Jim Adams, Associate Director, Montana Public Employees Association, represented the respondent. Kent Schaefer, Great Falls District Centralized Services Manager, was present, duly sworn, and offered testimony. Jean Bond,

Employee Relations Bureau Chief, was an observer. Documents admitted into the record without objection included Petitioner Exhibits E1 through E8 and administrative notice of the Unit Clarification petitioned, subsequent transfer and notice documents as well as administrative notice of Unit Determinations 6-88, 2-92, and 28-95 and Unit Clarification Numbers 9-88 and 9-94.

Proposed findings of fact, Conclusions of Law and Recommended Orders were concurrently submitted on April 4, 1997, received April 9, 1997.[1]

II. FINDINGS OF FACT

1. The subject position is a first line supervisor over five employees in the summer months and eight employees in the winter months. The function of the incumbent work unit has defined in the current (December 16 1996) (Exhibit E3) position description for the position indicates as follows:

> Work unit provides logistical support to all Great Falls District sections, bureaus, and divisions through such functions as accounting, budgeting, personnel, payroll, purchasing, inventory, property, work/data processing, communications, records management, customer service, road condition reporting, permit issues, statistical reporting, and analysis of operation.

2. Duties of the position include:

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[1]All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted. To the extent they are inconsistent herewith, they have been rejected. Certain proposed findings and conclusions may have been omitted as not relevant or necessary to a proper determination of the material issues presented. To the extent that witness testimony is not in accord with the findings herein, that testimony is not credited.

* preparing, approving, reconciling and analyzing accounts, purchasing, personnel and management documents and reports;

* directs day to day district office operation normally with but also independently, in the absence of the district office manager; including workload review, priority, assignment, cost and work quality evaluation, work shifts, annual leave as well as staff hiring and discipline recommendations;

* distribute, balance and evaluates staff work;

* direct and coordinate inventory, security and record reports;

* serve as voting member on staff vacancy applicant selection committees;

* recommend staff performance standards and evaluate staff;

* advise subordinate staff of office procedures and methods;

* during staff absences, including the district manager, perform their work duties as necessary;

* assist in development of district policies and procedures;

* train staff as well as evaluate and select training materials;

* direct and coordinate Adopt-A-Highway and Right-of-Way hay permit programs including program equality, records and highway sign administration;

* monitor district financial and personnel allocation expenditures.

3. The petitioner contended the position identified must be excluded from the unit because of the supervisory responsibilities as identified in Section 39-31-103(9)(b), MCA, which indicates, in part:

> (b) Public employee does not include:...
> (iii) A supervisory employee is identified in Section (11);...
> (11) "Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, 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 routine or clerical nature but requires the use of independent judgement.

4. The respondent contended that the incumbent position has no independent authority to hire or fire, layoff, recall, reward (financially), or discipline staff. Because work assignments involve routine work, some of which is performed by the incumbent position or recommended actions do not involve the use of independent judgement, that the position is not a "supervisory employee" as identified in Section 39-31-103(b).

III. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Section 39-31-202, MCA. Billings, Montana v. Firefighters Local No. 521, 13 LRRM 3324, 651 P.2d 627, 200 Mt. 421 (1982). The Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) decisions as a guideline for interpreting the Montana Collective Bargaining For Public Employees Act because the Montana Labor Relations Act is similar to the Federal Labor Management Relations Act. State ex. rel. Board of Personnel Appeals v. District Court, 183 Mont. 223 (1977) 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 v. State ex. rel. Board of Personnel Appeals, 195 Mont. 272 (1981), 635 P.2d 1301, 110 LRRM 2012; City of Great Falls v. Young (III) 683 P.2d 185 (1984), 119 LRRM 2682.

2. In addition to areas of supervisory authority exercised as identified in Section 39-31-103(11), MCA, the Board of Personnel Appeals has identified some secondary tests for use in determining whether a position is supervisory. The secondary tests as identified in UD 6-88, Montana Federation of State Employees v.

Montana Developmental Center, State of Montana, (1988) are as follows:

> ...The employee being designated as a supervisor; the fact that he is regarded by himself and others as a supervisor; the exercise of privileges accorded only to a supervisor; attendance at instructional sessions or meeting held for supervisory personnel; responsibility for a shift or phases of operations; authority to interpret or transmit employers 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; receiving substantially greater pay than other employees, not based solely on skill and failure to receive overtime...

3. In Billings Firefighter, supra, the Court determined that because no conflict resulted from inclusion of persons who were supervisors in the subject unit during an extended period of time under application of the grandfathering language of Section 39-31-109, the ruling of BPA was correct in allowing line battalion chiefs, specialty officers and fire captains, to remain in the unit.

Section 39-31-109, MCA, provides:

> **39-31-109 Existing Collective Bargaining Agreements not affected.** Nothing in this chapter shall be construed to remove recognition of established Collective Bargaining Agreements already recognized or in existence prior to July 1, 1973.

The exact date of recognition of this unit was not particularly identified as being before July 1, 1973. Respondent indicated in post hearing brief that, "No changes have occurred in the unit in the last 22 years." Backdating from the present 22 years is the year 1975 which is after the 1973 grandfather date set by statute. The Respondent representative indicated, again in post hearing brief, that the position in question in this case has

been in the unit since 1975 which is also after the date for the grandfathering protection of Section 39-31-109.

4. Under Section 39-31-103(b)(ii)(11), a person is considered a supervisor if the individual has authority in the interest of the employer to use independent judgement in non-routine or clerical nature work to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline employees, have responsibility to direct them, to adjust their grievances, or effectively recommend such action.

The Board and the NLRB have ruled that the existence of any one of the duties identified is sufficient to support supervisory status. In this case, undisputed evidence indicates the incumbent uses independent judgement in the interest of the employer to assign employees, direct employees, effectively recommend hire or non-hire decisions as a member of a hiring committee, as well as address grievances at Step 1 of the grievance process. These duties are sufficient to exclude the position from the unit under the statutory "supervisor" definition.

5. Consideration of the secondary test also results in the conclusion that the incumbent position is supervisory. Work includes unit responsibilities in the absence of the unit manager, authority to transfer or interpret instructions, inspection of others' work, authority to grant or deny leave, responsibility for reporting rule infractions in performance appraisals, keeping (approving) time records, receiving one pay grade greater pay. All these work duty secondary test positive findings support the conclusion that the position is supervisory.

6. Based on the foregoing analysis, position 55207, Accounting Technician, Class Code 160013 is found to be a "supervisory employee" as identified in Section 39-31-103, MCA.

IV. RECOMMENDED ORDER

The respondent Bargaining Unit of MPEA is hereby modified to exclude position no. 55207.

DATED this 29th day of April, 1997.

BOARD OF PERSONNEL APPEALS

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

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than May 22, 1997. This time period includes the 20 days provided for in ARM 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 59604

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CERTIFICATE OF MAILING

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

Jim Adams
MPEA
PO Box 5600
Helena MT 59604-5600

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

Paula Stoll, Chief
Labor & Employee Relations Bureau
Room 130 - Mitchell Bldg
Helena MT 59620

DATED this 29th day of April, 1997.

Christine L Roland

STLABOR.SP