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

IN THE MATTER OF UNIT CLARIFICATION NO. 14-97:

STATE OF MONTANA, LABOR AND EMPLOYEE RELATIONS BUREAU, DEPARTMENTS OF ADMINISTRATION AND JUSTICE, Petitioner, vs. MONTANA PUBLIC EMPLOYEES ASSOCIATION, Respondent.	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

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I. INTRODUCTION

An in-person hearing was held October 10, 1997, in conference room 3 of the Walt Sullivan Building, Helena, Montana. The Petitioner was represented by Bill Bentley, Labor Relations Specialist, Department of Administration. Respondent Montana Public Employees Association (MPEA) was represented by Carter Picotte, Attorney for the MPEA. Diana Reichenberg, incumbent Cashier Supervisor in position no. 17007, and Pam Wintrode, Department of Justice, gave sworn testimony. Joint Exhibits J-1 through J-6 and Petitioner's Exhibits S-1 through S-11 were admitted into the record without objection.

Upon completion of the hearing, parties agreed to the mutual exchange of post-hearing briefs, and the record was closed on November 6, 1997.

II. ISSUE

Whether Cashier Supervisor Position No. 17007 should be excluded from the existing bargaining unit at the Title and Registration Bureau, Motor Vehicle Division, Department of Justice.

III. FINDING OF FACTS

1. During a review of the organizational structure of the Cashier/Mail unit in the Title and Registration Bureau, Motor Vehicle Division, Department of Justice, the Petitioner anticipated the need for a line supervisor for the Cashier/Mail unit (hereafter Unit) and created a new supervisor position No. 17007. (Testimony Pam Wintrode; Exhibit S-4)

2. The Department of Justice(Department) promoted Diana Reichenberg (hereafter Reichenberg) into supervisor position No. 17007 in September 1996. It advertised the opening for the position as a non-bargaining unit position (Exhibit S-3). Previously, Reichenberg had held an Administrative Support position No. 17008 in the Unit. (Testimony of Reichenberg)

3. The collective bargaining agreement (Exhibit S-1, p.1, Section 1) specifically excludes supervisory positions from inclusion in the bargaining unit.

4. Incumbent Reichenberg supervises four positions classified as Administrative Support, one of which was currently vacant at the time of hearing (testimony of Reichenberg). Reichenberg's supervisor position is a grade 9 while the administrative support positions are classified as grade 6. Entry salary for a grade 9 is $16,630 while entry salary for a grade 6 is $13,118. (Exhibits S-4, S-5, S-6, S-7; testimony of Reichenberg).

5. Reichenberg considers herself a supervisor, and attended supervisory training on April 2, 1997 (Exhibit S-11; testimony of Reichenberg).

6. Approximately 25% of Reichenberg's work time involves supervisory duties pertinent to the daily operations of the Cashier/Mail unit within the Records Section. These duties include, but are not limited to: establishing performance standards and evaluating staff; participating on interview committees for new positions; making recommendations on promotion, hiring and retention of personnel; and identifying and providing ongoing training to employees (Exhibit S-4). The remainder of her time is spent in assisting with the handling of incoming mail and issuing receipts and accounting for all funds received by the bureau. (Exhibit S-4; testimony of Reichenberg).

7. In her position, Reichenberg does not have the final authority over all matters in her section, but has the authority to effectively recommend action to her immediate supervisor. If an unusual situation arises that requires attention by a higher authority, she refers the matter to the appropriate person. She has been in the position a short time, and has not been involved in a disciplinary action or discharge affecting her subordinates. She has approved time sheets and numerous requests for both sick leave and annual leave for her staff as reflected in March and April reports (Exhibits S-8 through S-10; testimony of Reichenberg).

IV. DISCUSSION

The parties jointly filed petition for unit clarification with the Board of Personnel Appeals (BOPA) for a determination whether the position in question is a supervisor as defined at § 39-31-

103(11), MCA. The definition of a supervisory employee found in the Montana statute closely resembles that found in the National Labor Relations Act. The Montana Supreme Court has approved the practice of BOPA using federal court and National Labor Relations Board (NLRB) precedents as guidelines for interpreting the Montana Collective Bargaining Act. State ex. Rel Board of Personnel Appeals v. District Court, 183 Mont. 223, 103 LRRM 2297 (1979); Teamsters Local No. 45 v. State ex. Rel Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (III),683 P.2d 185, 119 LRRM 2682 (1984).

Employees who are supervisors are exempt from both the state and federal definitions of public employee, primarily as a matter of policy, to improve the peacefulness of labor relations between employers and employees and to allow employers to have the undivided loyalties of these key employees. NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076, 1078 (6th Cir. 1987).

Montana law § 39-31-103(11), MCA, defines a supervisory employee as:

> any individual having authority in the interest of the employer to hire, transfer, suspend, lay-off, 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 merely routine or clerical nature but requires the use of the independent judgment.

Whether an employee is a supervisor depends on the duties performed by that employee for the organization. If Reichenberg has the authority to perform even one of the 12 listed activities with the use of independent judgment, or effectively recommend, then she should not be a member of the bargaining unit at the Title

and Registration Bureau. NLRB v. Konig, 79 F.3d 354, 357 (3rd Cir. 1996), citing Health Care and Retirement Corp., supra, 114 S.Ct. 1780; Manor West, Inc. V. NLRB, 60 F.3d 1195. 1197 (6th Cir. 1995).

Respondent argues that Reichenberg spends very little time in any supervisory capacity. Nevertheless, when an employee possesses at least one of the authorities under the supervisory statute, he or she is indeed a supervisor regardless of the frequency within which these responsibilities are exercised. It is well settled that if an individual is shown to exercise supervisory authority, the frequency with which she exercises that authority does not negate the conclusion that she is a supervisor. E and L Transport Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996). See also, Northeast Utility Service Corp v. NLRB, 35 F.3d 621, 624 (1st Cir. 1994).

It is the function of the employee that is critical rather than the label or title. Therefore, it is a question of fact in each individual case as to whether the individuals involved are supervisors. The exercise of any one of these statutory supervisory criteria must be accomplished with at least some independent judgment and cannot be routine clerical or perfunctory. George C. Foss Company v. NLRB, 75 F.2d 1407, 118 LRRM 2746 (9th Cir. 1985).

The BPA outlined the following considerations for determining supervisory status in Billings Firefighters Local 521 v. City of Billings, UC 1-77:

> Whether the employee has independent authority to perform the functions enumerated in the Act.
>
> Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates.

Whether an unrealistic and excessively high ration of supervisors to employees would be created.

State government supervisors are subject to greater review than private sector counterparts. They have subjectively less freedom to exercise their authority by the nature of their employment; however, this does not lessen the ultimate authority delegated Reichenberg in her status as a supervisor. The record reflects that she effectively recommends concerning key criteria analyzed such as reviewing and approving time sheets. See, e.g., Montana Public Employees Association vs. Department of Institutions, UC 9-88 (1989). Finally, employees have been found to be supervisors, even though restricted by federal guidelines and company policies where they were performing at least one of the twelve statutory criteria. Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 360 (1st Cir. 1980).

The Montana Board, like the NLRB, also considers certain secondary tests in determining supervisory status. The tests that have been considered are the following:

(1) the employee being designated a supervisor; (2) the fact that he is regarded by himself or others as a supervisor; (3) the exercise of privileges accorded only to supervisors; (4) attendance at instructional sessions or meetings held for supervisory personnel; (5) responsibility for a shift or phases of operations; (6) authority to interpret or transmit employer's instructions to other employees; (7) the responsibility for inspecting the work of others; (8) instruction of other employee; (9) authority to grant or deny leave of absence to others; (10) responsibility for reporting the rule infractions and keeping of time records on other

employees, not based solely on skill; (12) failure to receive overtime.

A review of the record establishes that the cashier supervisor position meets a sufficient number of the criteria to be designated as a supervisor. The position meets several of the primary tests, and, in addition, meets many of the secondary tests. For example, the incumbent is responsible for establishing weekly schedules, routing daily work, establishing and evaluating performance standards, approving time sheets, participating on interview committees, approving and denying leave requests and training new cashier unit employees.

IV. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to the Montana Collective Bargaining for Public Employees Act, § 39-31-101, et seq., MCA.

2. Position 17007 held by incumbent Diana Reichenberg meets the definition of a supervisory employee and should be excluded from the collective bargaining unit pursuant to A.R.M. 24.26.630.

V. RECOMMENDED ORDER

It is **ORDERED** that position 17007 held by incumbent Diana Reichenberg be excluded from the collective bargaining unit.

DATED this 30TH day of January, 1998.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce

Gordon D. Bruce
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 February 23, 1998. 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:

Carter Picotte, Attorney
MPEA
PO Box 5600
Helena, MT 59604

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 Interdepartmental mail service.

Bill Bentley, Labor Relations Specialist
Labor Relations Bureau
State Personnel Division
Room 130, Mitchell Building
Helena, MT 59620

DATED this 30th day of January, 1998.

Sandra K. Page